Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

PATRICK T. MURPHY,
Cook County Public Guardian, as Guardian of the Estate and Person of John F. Wellman, a Disabled Person Now Deceased,

Petitioner,

v.

SAMUEL H. YOUNG,
an Interested Person and Executor of the Decedent's Estate of John F. Wellman,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under Illinois law a guardian who is the relative of a ward may appeal a termination of his or her guardianship but, under the ruling below, a nonrelative guardian (such as the Cook County Public Guardian) cannot appeal such a termination. Under Illinois law, if the party seeking termination of a nonrelative guardian's guardianship loses, that party can appeal but, under the ruling below, if the nonrelative guardian loses in the same litigation, the guardian cannot appeal. Does this twofold discrimination violate the equal protection and due process clauses of the Fourteenth Amendment?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the Supreme Court of Illinois, which is the subject of this request for review:

PATRICK T. MURPHY, Cook County Public Guardian,

as Guardian of the Estate and Person of John F. Wellman, a Disabled Person now Deceased,

Plaintiff-respondent below

SAMUEL H. YOUNG, an Interested Person and Executor of the Decedent's Estate of John F. Wellman,

Defendant-petitioner below.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Patrick T. Murphy, the Cook County Public Guardian ("Public Guardian"), as the court-appointed guardian of the estate and person of John F. Wellman ("Wellman"), a disabled person now deceased, respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Illinois ruling that the Public Guardian did not have standing to appeal from a trial court order restoring Wellman to competency. The Illinois Appellate Court found that an attorney had engaged in unethical conduct to gain access to Wellman's $840,000 estate. The Illinois Supreme Court nevertheless permitted this lawyer to retain all of Wellman's assets.

OPINIONS BELOW

The Illinois Supreme Court issued an opinion on October 18, 1996, affirming in part and reversing in part a judgment of the Appellate Court of Illinois, First District, and ruling that the Public Guardian did not have standing to appeal from a trial court order restoring Wellman to competency. The decision is reported as *In re Estate of Wellman*, 174 Ill. 2d 335, 673 N.E.2d 272 (1996), and is set forth in Appendix A. On December 2, 1996, the Illinois Supreme Court entered an order denying the Public Guardian's petition for rehearing. The order is set forth in Appendix D. The petition for rehearing is set forth in Appendix C. The unpublished order of the Appellate Court of Illinois, First District, entered March 15, 1995, is set forth in Appendix B.

JURISDICTION

On October 18, 1996, the Illinois Supreme Court issued its opinion holding that the Public Guardian did not have standing to appeal from a trial court order restoring his ward to competency. The court thereby reversed the rulings on standing made by both the trial court and the appellate court. Appendix A. On November 8, 1996, the Public Guardian filed a petition for rehearing raising the federal question upon which review is sought here. Appendix C at 4, 12-14. On December 2, 1996, the Illinois Supreme Court denied the Public Guardian's petition for rehearing thereby rejecting his argument that the court's ruling on standing violates the Fourteenth Amendment equal protection and due process clauses. Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves section 1 of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The Public Guardian seeks review of a judgment of the Illinois Supreme Court ruling that he did not have standing to appeal from a trial court order restoring his ward, Wellman, to competency. The trial court had appointed the Public Guardian as the guardian of the estate and the person of Wellman. It specifically held that the Public Guardian had standing to pursue an appeal of its ruling that the ward had regained competency. Appendix A at 1, 7; Appendix B at 4, 19, 21. The appellate court confirmed that ruling with little discussion. Appendix B at 25. The Illinois Supreme Court, on the other hand, ruled that the Public Guardian had no such standing. Appendix A at 9-15.

Since Illinois law has for decades allowed relatives of persons alleged to be incompetent to appeal from a trial court's finding of competency, the Illinois Supreme Court's ruling that the Public Guardian lacked such standing appeared to effectuate an unconstitutional discrimination. Consequently, the Public Guardian filed a petition for rehearing specifically raising the argument that the court's ruling deprived him of equal protection and due process of law under the federal constitution. Appendix C at 12-14. The Illinois Supreme Court denied the petition for rehearing. Appendix D.

STATEMENT OF FACTS

Preface

In a scene that might have played in the halls of the chancery courts in Charles Dickens' *Bleak House*, the trial court allowed an unscrupulous lawyer to befriend an elderly, mentally disabled gentleman who had no family or friends and then to use his influence to obtain control over this man's $840,000 estate.

The old gentleman's guardian, the Cook County Public Guardian, appealed the ruling, and the appellate court found that the lawyer had overreached. It reversed the trial court's ruling that the lawyer could prey upon this elderly, disabled gentleman with impunity.

The Illinois Supreme Court, however, reinstated the trial court's ruling. It held that the Public Guardian had no standing to appeal in the first place.

Facts and proceedings below

On March 30, 1990, the Public Guardian filed a petition in the Circuit Court of Cook County for appointment as guardian for Wellman, an 89-year-old person suffering from manic psychosis, mild dementia, and blood malignancy. Wellman had never married or had any children. His parents and siblings had died. Appendix A at 2-4; Appendix B at 3, 12.

On May 8, 1990, the court appointed the Public Guardian plenary guardian of the estate and person of Wellman. On May 24, 1990, the court entered an order freezing Wellman's bank accounts at the Northern Trust Company bank. Appendix A at 4; Appendix B at 4.

On June 13, 1990, Samuel H. Young ("Young") filed an appearance as an "interested party" and petitioned to vacate the orders appointing the Public Guardian and freezing the bank accounts. Young alleged that he was an attorney who had an attorney-client relationship with Wellman. According to Young, from December 1988 through January 1990, Wellman freely entered into a series of agreements that named Young as Wellman's agent and joint tenant (with right of survivorship) on virtually all of Wellman's assets, which included several U.S. Treasury bills and bank accounts having a total value of approximately $840,000. Appendix A at 4; Appendix B at 4-5.

On June 14, 1990, Robert Downing ("Downing"), an attorney acting in concert with Young, filed an appearance for Wellman and moved to restore his competency and revoke the Public Guardian's guardianship. On June 24, 1990, Downing also filed a motion to vacate the order appointing the Public Guardian as Wellman's guardian. Appendix A at 4-5; Appendix B at 4-5.

On July 24, 1990, the Public Guardian filed a petition to revoke the agency agreement between Wellman and Young, to remove Young as Wellman's agent, and to sever the joint tenancies granting Young the right of survivorship to Wellman's assets. The petition alleged that the agency agreement and joint tenancies resulted from Young's undue influence and fraud. Appendix A at 5; Appendix B at 5.

From January 7 to March 28, 1991, the court held hearings on the Public Guardian's petition. From May 8 to 10, 1991, the court held hearings on Downing's petition

to restore Wellman. Appendix A at 5. On June 3, 1991, the trial court entered its judgment which restored Wellman to competency and approved the Wellman-to-Young give-away. Appendix A at 5-6; Appendix B at 19-21.

On June 12, 1991, the Public Guardian filed a motion for leave to appeal and the trial court granted the motion the same day. Appendix A at 6-7. On June 28, 1991, the Public Guardian filed a notice of appeal to the Appellate Court of Illinois, First Judicial District. Appendix A at 7.

Ten days before his death on August 17, 1991, Wellman executed a will, which, not unexpectedly, left his property to Young. Appendix B at 21; Appendix C at 6.

On March 15, 1995, the appellate court ruled that the question of whether the trial court erred in denying the Public Guardian's petition to sever the joint tenancies was not moot by reason of Wellman's death, that the Public Guardian had standing to appeal the denial of his petition to sever the joint tenancies, and that the trial court's discharge of the Public Guardian did not deprive him of his ability to appeal an adverse ruling in the trial court. Appendix B at 24-25.

The appellate court further ruled that Young had failed to present sufficient evidence to overcome the presumption that Young, an attorney, had exercised undue influence over Wellman. The appellate court ordered that "[t]he joint tenancies are therefore hereby severed." Appendix B at 25-27.

Young and Downing took appeals to the Illinois Supreme Court from the appellate court's severance of the joint tenancies. On October 18, 1996, the Illinois

Supreme Court reversed the appellate court's severance of the Wellman-Young joint tenancies, holding that the Public Guardian lacked standing to appeal from the trial court's denial of his petition to sever the tenancies. Appendix A at 1-2, 9-10. The court ruled that the trial court orders restoring Wellman and discharging the Public Guardian deprived the Public Guardian of standing to appeal. Appendix A at 10-15.

On November 8, 1996, the Public Guardian filed a petition for rehearing in the Illinois Supreme Court arguing that "where appeal rights are granted unequally, . . . both due process and equal protection are violated." Appendix C at 12. The Public Guardian argued:

> In Illinois, parties to civil proceedings, including proceedings in probate have the right to appeal adverse decisions. In addition, Illinois law recognizes the standing of a party, who sought unsuccessfully to become the guardian of an allegedly disabled individual, to exercise the right to appeal the decision if the party is a relative. *See People ex rel. Dombroski v. O'Connell*, [378 Ill. 346, 38 N.E.2d 40, 42-43 (1941)]. However, if this Court's decision finding that the Public Guardian has no standing becomes law, a small class of individuals who are parties in the trial court will be denied the right to appeal an adverse decision in civil proceedings in general and probate proceedings in particular – guardians of the estate or person of a ward who has been restored. To deny the right to appeal from an order of the probate court to one party but not to others is unconstitutional.

Appendix C at 12-13 (footnote omitted). Petitioner concluded, "[t]he denial of standing makes the case effectively unreviewable and discriminates against a small class of litigants without any rational basis." Appendix C at 14.

On December 2, 1996, the Illinois Supreme Court denied the Public Guardian's petition for rehearing. Appendix D.

REASONS FOR GRANTING THE WRIT

THE UNREASONED AND ARBITRARY TWOFOLD DISCRIMINATION PRODUCED BY THE DECISION OF THE COURT BELOW CLEARLY VIOLATES EQUAL PROTECTION AND DUE PROCESS PRINCIPLES ESTABLISHED BY THIS COURT MORE THAN TWO DECADES AGO AND DISADVANTAGES THE PUBLIC OFFICIAL WHO IS APPOINTED TO PREVENT THE TYPE OF OVERREACHING AND UNPROFESSIONAL CONDUCT ENGAGED IN BY PETITIONER'S ADVERSARY BELOW.

For over half a century, the Illinois Supreme Court has allowed relatives of persons alleged to be incompetent to appeal from trial court findings of competency. In *People ex rel. Dombroski v. O'Connell*, 378 Ill. 346, 38 N.E.2d 40 (1941), certain of the children of an elderly widower filed a petition for the appointment of a conservator (now "guardian") of the person and the estate of their father. They named him and two of their siblings as defendants. The petitioners alleged that because of their father's age and physical and mental incapacity he was incompetent to manage his estate. After a hearing, the probate court

denied the petition. 38 N.E.2d at 41. The children sought to appeal, but the trial court denied leave to appeal. The children filed a petition seeking to compel the trial court to grant the appeal, but the petition was dismissed. 38 N.E.2d at 41-42.

On appeal the Illinois Supreme Court reversed, squarely holding that the children had a right to appeal. Indeed, it would have been "an anomaly to say that [the children], though proper parties to bring this action, are not proper parties to appeal from a decision against them." 38 N.E.2d at 42. The court then raised the question that lies at the heart of the matter in the present case as in *Dombroski*:

> Appellants, petitioners, are children of the alleged incompetent. As next of kin they had a right to file the petition. If they have no right to appeal as a party aggrieved from a final order against them as such petitioners, the question arises: Who may exercise the right of appeal given by section 330 of the Probate Act?

Id.[1] The court answered the question invoking due process:

> It is conceded that had the court decided the issues against the defendants, they or any of them could appeal from such decision. If petitioners may not appeal, and the defendants may, then the statutory provision giving the right of appeal to one feeling himself aggrieved *fails to provide due process of law*, and the judge who

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[1] Former section 330 is codified today in section 26-1 of the Probate Act of 1975 (755 ILCS § 5/26-1 (West 1996)) which provides: "Appeals may be taken as in other civil cases."

> enters the order is in the position of being the absolute ruler over his own decision. Such a situation is abhorrent to the letter and spirit of the law.

Id. (emphasis supplied).

Illinois courts continue to recognize the validity of *Dombroski*. *See, e.g., In re Estate of Roy*, 265 Ill. App. 3d 99, 637 N.E.2d 1228, 1230 n.1 (3d Dist. 1994). Thus, if the Public Guardian were a relative of Wellman, he would unquestionably have had standing to appeal.[2] The Illinois Supreme Court has now ruled, however, that, if you are seriously disabled and in need of a guardian but the trial court erroneously rules that you are competent, an appeal may be taken only if your relatives sought the incompetency order. If a person has no relatives, or if he or she does but they are disinterested, the trial court's erroneous ruling will stand, leaving the most vulnerable disabled persons to fend off predators all by themselves.

The Illinois Supreme Court's decision in the present case is squarely at odds with this Court's decision in *Lindsey v. Normet*, 405 U.S. 56 (1972). The class action plaintiffs in that case argued that Oregon's Forcible Entry

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[2] *Dombroski* cannot be distinguished from the present case on the ground that the children in *Dombroski* were attempting to appeal from the denial of their petition while the Public Guardian sought to appeal from an order restoring competency. The posture of both cases on appeal is exactly the same: The trial court has ruled that the ostensible incompetents were competent, and the parties against whom the trial court ruled seek to appeal.

and Wrongful Detainer Statute ("FED") was unconstitutional on its face. Although upholding most of the provisions of the law, a seven-justice majority of this court held that the double-bond prerequisite for a tenant to appeal in an FED action violated the tenants' right to equal protection. *Id.* at 74, 79-80, 92.

Lindsey noted that, to appeal a civil case in Oregon, the ordinary litigant was required to file an undertaking, with one or more sureties, covering all damages, costs, and disbursements that may be awarded against the appellant in the appeal. In an FED action, however, a defendant-tenant who lost in the trial court and wished to appeal was required to give, in addition to the undertaking otherwise required, an undertaking with two sureties for the payment of twice the rental value of the premises from the commencement of the action until final judgment. *Id.* at 74-76.

This Court held that Oregon's additional requirements for an FED appeal

> bear no reasonable relationship to any valid state objective and . . . arbitrarily discriminate against tenants appealing from adverse decisions in FED actions.
>
> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, [citations omitted] and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. [Citations omitted.]

> . . . The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement . . . violates the Equal Protection Clause.

Id. at 76-79.

Since it was decided, *Lindsey* has never been seriously questioned and in this term, in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), this Court has favorably reviewed it.

There is no rational justification for the discrimination that the Illinois Supreme Court has wrought in the present case. It is inconceivable that the appealability of a competency ruling should depend upon a fortuity – whether or not the alleged incompetent had close relatives who were willing and able to file and pursue a guardianship proceeding.

There is this difference between the *Lindsey* discrimination and the discrimination in the present case: The *Lindsey* discrimination "heavily burden[ed] the statutory right of a [tenant] defendant to appeal." *Lindsey v. Normet, supra,* 405 U.S. at 77. It did not, as in the present case, operate to absolutely bar the right of a party to appeal. The present case thus demonstrates an arbitrary, capricious, and irrational denial of a right to appeal that is even more odious under the Fourteenth Amendment than that in *Lindsey*.

Yet another aspect of the discrimination in the case at bar underlines its irrationality. Prior to the Illinois Supreme Court's decision, Illinois barred appeals from final judgments to no persons who were parties in the trial court except, obviously, the People from a judgment

of acquittal in a criminal case. Indeed, the Illinois Constitution guarantees such appeals as "a matter of right":

> Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. . . .

Ill. Const. art. VI, § 6. The discrimination wrought by the Illinois Supreme Court, despite the clear mandate of the Illinois Constitution, is thus not merely between putative relative and nonrelative guardians in competency cases. It is also discrimination between nonrelative guardians in such cases and *all other parties in all other cases*. There is no possible justification for such a distinction. This is a clear instance of a state's affording appeals to some litigants but capriciously and arbitrarily denying them to others. It is thus a blatant violation of the Equal Protection Clause.

Finally, the ruling below has a sinister aspect. The Public Guardian is appointed to protect disabled individuals who have no relatives or close friends to watch out for them. These isolated, elderly people often fall prey to unscrupulous individuals who pretend to befriend them, only to gain control over their assets, as is graphically demonstrated by this case. The ruling below not only prevents the Public Guardian from discharging his duties, by discriminating against him, but of necessity discriminates against his wards – incompetent, abandoned individuals who now have no lawful protector.

CONCLUSION

In the face of such an obvious violation of the Fourteenth Amendment, this Court should grant the Public Guardian's petition for a writ of certiorari, and the petitioner, Patrick T. Murphy, the Cook County Public Guardian, respectfully asks this Court to do so.

Respectfully submitted,

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APPENDIX A

(Filed Oct. 18, 1996)

Docket Nos. 80182, 80184, 80246 cons. – Agenda 21 – May 1996. *In re* ESTATE OF JOHN F. WELLMAN (Samuel H. Young, Appellant; Patrick T. Murphy, Appellee).

JUSTICE FREEMAN delivered the opinion of the court:

These consolidated appeals arise out of a series of events during the last years in the life of John Wellman. He executed a durable power of attorney, in which he appointed his attorney, Samuel Young, as his agent. Wellman also established joint tenancies with Young in several accounts. The circuit court of Cook County: adjudicated Wellman mentally disabled and appointed Patrick Murphy, the public guardian of Cook County, as Wellman's plenary guardian; restored Wellman to competency and discharged Murphy; and granted Murphy leave to appeal as Wellman's plenary guardian. Wellman died. Lastly, the trial court granted the fee petition of Wellman's guardian *ad litem.*

In an unpublished order (Nos. 1-90-3008, 1-90-3011, 1-91-2055, 1-92-1983 cons. (unpublished order under Supreme Court Rule 23)), the appellate court: held that Murphy had standing to appeal, severed the joint tenancies, upheld the fee award to Wellman's guardian *ad litem,* and held that Wellman's death rendered moot the parties' remaining issues on appeal. We allowed leave to appeal (155 Ill. 2d R. 315(a)). We now reverse the appellate court's severance of the Wellman-Young joint tenancies,

and affirm the appellate court's upholding of the guardian *ad litem's* fee award and dismissal of the remaining issues.

BACKGROUND

The record contains the following facts that are pertinent to our disposition of the issues raised on appeal. John Wellman was born in 1900. A certified public accountant, he was a self-employed businessman and stock trader during his lifetime. By early 1990, he had accumulated assets totalling approximately $850,000, of which $650,000 were invested in United States Treasury bills, savings and checking accounts, and stock.

Samuel Young was admitted to the Illinois bar in 1948. In 1986, Wellman first employed Young concerning the probate of an estate. Wellman was the executor of the estate; he had been a joint tenant with the testator in certain accounts. Wellman continued using Young's services concerning, *inter alia*, tax preparation, real estate matters, and the management of Wellman's property.

In a letter to Young dated March 21, 1988, Wellman stated in writing what he had previously told Young on "many occasions." Wellman, having no family, asked for Young's assistance in handling his financial affairs. Wellman also wanted Young to look after his affairs if he should become incapacitated. On December 27, 1988, Wellman executed a durable power of attorney in which he appointed Young as his agent. See generally 755 ILCS 45/1-1 *et seq.* (West 1992). Wellman granted Young broad authority to act for him whether competent or incompetent.

On December 1, 1989, Wellman and Young exchanged two letters. The first letter, from Wellman to Young, confirmed: Wellman's previous request for Young to assist him in managing his property, Young's agreement to provide such assistance, and, in consideration thereof, Wellman's promise to place his property in joint tenancy with Young with right of survivorship. Also, during Wellman's life, all of the assets and income would be used for Wellman.

The second letter, from Young to Wellman, acknowledged: Wellman's decision to make Young his "partner" in managing his property, Wellman's decision to place his property in joint tenancy with Young to avoid probate, Young's agreement to look after Wellman and to see that Wellman had medical and health care, Young's agreement not to spend or use Wellman's property for any purpose other than for Wellman's benefit, and Wellman's power to revoke the joint tenancies at any time and to make gifts to others at his death.

On December 7, 1989, Wellman and Young visited the Northern Trust Bank in Chicago. They spoke to Paul Larson, who had been Wellman's personal banker since 1984. Wellman and Young instructed Larson to place Wellman's savings and checking accounts in joint tenancy. Larson refused. Eventually, Wellman and Young closed the account, totalling $188,000, but returned when the bank agreed to the Wellman-Young joint accounts.

After visiting the Northern Trust Bank, Wellman and Young went to the Federal Reserve Bank in Chicago. They spoke to Andrew Vlahos, who had served Wellman since 1985. They discussed Wellman's United States Treasury

Direct Account and joint tenancy with Young. On January 30, 1990, the account was placed in the name of Wellman and Young in joint tenancy with right of survivorship.

In December 1989, Vlahos contacted Assistant Illinois Attorney General Ann Parisi. Vlahos told Parisi that Young possibly was exploiting Wellman. On December 21, 1989, Parisi visited Wellman to investigate whether any laws had been violated and whether Wellman had been financially exploited in any way.

On January 7, 1990, the Illinois Attorney General's office referred the matter to the Cook County public guardian's office to investigate whether Wellman needed a guardian. On March 30, 1990, Murphy petitioned the trial court to be appointed plenary guardian of Wellman's person and estate. On April 3, 1990, the trial court appointed Sandra Thiel as Wellman's guardian *ad litem*. On May 8, 1990, at the close of a hearing, the trial court adjudicated Wellman mentally disabled and appointed Murphy plenary guardian of Wellman's person and estate. On May 24, 1990, the trial court, granting Murphy's petition, entered an order freezing the Wellman-Young joint accounts at the Northern Trust Bank.

On June 13, 1990, Young petitioned the trial court to vacate the appointment of the plenary guardian for Wellman. In a separate filing, Young petitioned the court to vacate the order freezing the bank accounts. On June 14, 1990, Wellman's attorney, Robert Downing, petitioned the trial court to restore Wellman to competency and discharge Murphy and Thiel, and to vacate the order freezing the bank accounts. Also, on June 24, 1990, Downing moved to vacate the May 8, 1990, guardianship order

specifically because it violated Wellman's due process rights and the durable power of attorney.

On July 13, 1990, Murphy moved to dismiss Young's petition to vacate the appointment of a plenary guardian for Wellman. In a separate filing, Murphy moved to dismiss Downing's petition to restore Wellman. Murphy also filed answers to Young's and Downing's petitions. On July 24, 1990, Murphy petitioned the trial court to: (1) revoke the durable power of attorney in which Wellman appointed Young as his agent, and (2) sever all of the joint tenancy accounts.

On September 12, 1990, Murphy moved for summary judgment on Young's and Downing's petitions to vacate the guardianship order. On September 19, Young cross-moved for summary judgment on his petition.

In orders entered on October 16 and 17, 1990, the trial court granted Murphy's motion for summary judgment and denied Young's and Downing's petitions on most issues. On October 19, 1990, Downing (Docket No. 1-90-3008) and Young (Docket No. 1-90-3011) each appealed from the trial court's denial of their respective petitions.

From January 7 through March 28, 1991, the trial court held hearings on Murphy's July 24, 1990, petition to revoke the durable power of attorney and sever the joint tenancies. On May 8 through 10, 1991, the court held hearings on Downing's June 14, 1990, petition to restore Wellman.

On June 3, 1991, the trial court entered a "final judgment order" dismissing Murphy's petition and granting

Downing's petition. The court terminated the adjudication of mental disability, restoring Wellman to competency. The court also vacated its order freezing the Northern Trust Bank accounts.

On June 12, 1991, Murphy filed in the trial court a "Motion for Leave to Appeal" to the appellate court. In the motion, Murphy acknowledged that by terminating the adjudication of mental disability, the trial court restored Wellman to competency and discharged Murphy as his guardian. Murphy further stated:

> "3. That having been discharged as guardian of the estate and person of John F. Wellman, the Public Guardian has no standing to act on behalf of the estate in any respect including appeal of the June 3, 1991, final judgment order.
>
> 4. That it would be a circumvention of the Illinois Supreme Court Rules and clearly against their spirit and intent to deny the estate any opportunity to appeal from this final judgment order.
>
> 5. That there is no other party available to take an appeal of such order other than the Public Guardian of Cook County.
>
> 6. That the Public Guardian will not seek any fees from the estate of John F. Wellman for any work on the appeal.
>
> WHEREFORE, the Public Guardian of Cook County respectfully requests leave of this court to prosecute an appeal, on behalf of the estate of John F. Wellman, of this court's final judgment order entered on June 3, 1991."

The trial court entered an order stating in pertinent part that Murphy, as Wellman's plenary guardian of Wellman's estate, was granted leave to appeal from the final judgment order "on behalf of the estate."

On June 28, 1991, Murphy filed his notice of appeal in the appellate court (Docket No. 1-91-2055). Murphy asked the appellate court to reverse the trial court's final judgment order and empower the guardian to revoke the agency agreement between Wellman and Young, reverse the trial court's restoration of Wellman, hold that the Young-Wellman joint tenancies are null and void, and order all accounts to revert back to the sole ownership of Wellman.

On July 3, 1991, Murphy filed in the trial court a first and final account of Wellman's estate. Murphy distributed to Young $955.23, which was the balance of the cash receipts and disbursements that Murphy handled during the guardianship. The trial court approved the final account, formally discharged Murphy as plenary guardian of the person and estate of Wellman, and closed the estate.

On August 17, 1991, Wellman died. Around August 28, Young formally reported Wellman's death to the trial and appellate courts, Downing, and Murphy. On October 2, 1991, Wellman's will was admitted to probate and Young was appointed executor.

On January 30, 1992, Thiel, Wellman's guardian *ad litem*, petitioned the trial court for a fee award of $4,843 to "be paid from the funds" of Wellman. Young moved to dismiss. On April 15, 1992, the trial court denied Young's motion to dismiss and awarded Thiel fees in the amount

requested. Young appealed from the fee award (Docket No. 1-92-1983).

The appellate court consolidated the four separate appeals. On February 17, 1993, the court heard oral argument and, on March 15, 1995, issued an unpublished order (134 Ill. 2d R. 23). The court held that Wellman's death rendered moot most of the issues raised on appeal. However, the appellate court held that Murphy's discharge as Wellman's plenary guardian, or Wellman's subsequent death, did not deprive Murphy of standing to appeal from the denial of his petition to sever the joint tenancies. The appellate court then reversed the trial court and severed the joint tenancies. The court also upheld the fee award to Thiel. Young, Downing, and Murphy all appeal.

DISCUSSION

Before this court, Downing and Young continue their piecemeal appellate litigation style. In cause No. 80182, Downing appeals from the appellate court's severance of the joint tenancies. In cause No. 80184, Young appeals from the trial court's initial adjudication of Wellman as mentally disabled, and the appellate court's severance of the joint tenancies. Murphy, responding in these causes, cross-appeals from the trial court's restoration of Wellman. In cause No. 80246, Young appeals from the appellate court's judgment upholding the trial court's fee award to Thiel. We consolidated these causes for review.

Murphy's Standing to Appeal Joint Tenancies

Young and Downing contend that the appellate court erred in severing the Wellman-Young joint tenancies. Each initially argues that Murphy lacked standing to appeal from the denial of his petition to sever the joint tenancies.

The doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome. The purpose of the doctrine is to ensure that courts are deciding actual, specific controversies and not abstract questions or moot issues. *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 279-80 (1989); see 59 Am. Jur. 2d *Parties* §§30, 31 (1987). Standing "is not simply a procedural technicality" (59 Am. Jur. 2d *Parties* §30, at 416 (1987)), but rather is an aspect or a component of justiciability. *In re Estate of Burgeson*, 125 Ill. 2d 477, 485 (1988); *Weihl v. Dixon*, 56 Ill. App. 3d 251, 253 (1977).

The essence of the inquiry regarding standing is whether the litigant, either in an individual or representative capacity, is entitled to have the court decide the merits of a dispute or a particular issue. *Helmig v. John F. Kennedy Community Consolidated School District No. 129*, 241 Ill. App. 3d 653, 658 (1993). This court has repeatedly held that standing requires some injury in fact to a legally recognized interest. *Rodriguez*, 131 Ill. 2d at 280 (and cases cited therein).

We agree with Young and Downing that Murphy lacked standing to appeal from the denial of his petition to sever the Wellman-Young joint tenancies. We note that

our conclusion is based on established guardianship principles, and that Murphy, as a public guardian, "has all the powers and duties of any other guardian appointed under the Probate Act of 1975." *Burgeson*, 125 Ill. 2d at 486. The occurrence of two events deprived Murphy of standing. First, the trial court restored Wellman to competency and discharged Murphy. Second, Wellman died. 755 ILCS 5/24-12 (West 1992).

Wellman's Restoration

Murphy himself acknowledged to the trial court in his motion for leave to appeal that the court restored Wellman and discharged Murphy. He also admitted that, as a result, he had "no standing to act on behalf of the estate in any respect including appeal of the June 3, 1991, final judgment order."

However, the trial court granted Murphy leave to appeal "on behalf of the estate." The appellate court held that Murphy had standing to appeal, reasoning:

> "We first find that the Public Guardian had standing to appeal the denial of his petition to sever the joint tenancies. The Public Guardian had an interest in seeking that relief because the Public Guardian had been appointed plenary guardian of Wellman and because he believed that his ward was incapable of handling his own affairs. The discharge of the Public Guardian did not deprive the Public Guardian of the ability to appeal an adverse ruling."

This reasoning was erroneous. Murphy correctly acknowledged that Wellman's restoration deprived him of standing to appeal. The Probate Act of 1975 does not

provide for the *automatic* termination of a guardianship for a disabled ward as in the case of a guardianship for a minor ward who reaches the age of majority (see 755 ILCS 5/11-14.1 (West 1992)). Rather, the Act requires the trial court to hold a hearing on the petition of the ward, someone on the ward's behalf, or on the court's own motion, to revoke or modify the guardianship. 755 ILCS 5/11a-20, 11a-21 (West 1992). At the close of the hearing, the court may: "(1) dismiss the petition; (2) terminate the adjudication of disability; (3) revoke the letters of guardianship of the estate or person, or both; (4) modify the duties of the guardian; and (5) make any other order which the court deems appropriate and in the interests of the ward." 755 ILCS 5/11a-21(c) (West 1992).

In *Hoff v. Meirink*, 12 Ill. 2d 108, 111 (1957), this court stated:

> "While it is clear that a restoration to competency does not *ipso facto* terminate the office of the conservator, it by no means follows that the probate court can continue to exercise its supervisory power over the property of the ward after the ward has been restored to competency and until the conservator's office terminates. Indeed, serious constitutional questions would be presented by a statute that provided for the exercise of supervisory power after the ward's disability had been removed. We find no such provision in the Probate Act."

The appellate court has correctly read *Hoff* as "authority for the general proposition that a restored ward becomes reinvested with the rights he lost when adjudicated an incompetent." *In re Estate of Hayden*, 105 Ill. App. 3d 60, 65 (1982). Upon the restoration of a mentally disabled

ward, the ward has the right to be put in possession of his or her property, and to ask the court to order the guardian to deliver to the ward all of the ward's money and property that the guardian has, or the money and property to which the ward is entitled. *In re Estate of Berger,* 166 Ill. App. 3d 1045, 1055 (1987).

Following the restoration of a ward, the now-competent former ward is capable of representing, and has the right to represent, his or her own interests. Thus, the guardian no longer has standing to represent in court the interests of the former ward. *Hayden,* 105 Ill. App. 3d at 63-66.

Further, we agree with long-established authority that upon a ward's restoration, the guardian lacks standing to appeal therefrom. *In re Guardianship of Love,* 19 Ohio St. 2d 111, 249 N.E.2d 794 (1969) (and cases cited therein); see, *contra, Cobb v. South Carolina National Bank,* 210 S.C. 533, 43 S.E.2d 465 (1947). Courts reason that the guardian lacks a legally sufficient interest in the ward's restoration to allow the guardian to contest it on appeal. The guardian " 'is simply a trustee and can have no interest in this regard adverse to the recovery of sanity by the ward.' " *Love,* 19 Ohio St. 2d at 114-15, 249 N.E.2d at 796, quoting *Ensign v. Flaxon,* 224 Mass. 145, 150, 112 N.E. 948, 950 (1916).

This reasoning is quite settled in Illinois. The appointment of a guardian creates the relation of trustee and beneficiary between the guardian and the ward. The estate becomes a trust fund for the ward's support. *Lewis v. Hill,* 387 Ill. 542, 545 (1944). The guardian only acts as the hand of the court and is at all times subject to the

court's direction in the manner in which the guardian provides for the care and support of the disabled person. *In re Estate of Nelson*, 250 Ill. App. 3d 282, 287 (1993).

Also, guardianship proceedings are not, strictly speaking, adversarial. The trial court protects the disabled person as its ward, vigilantly guarding the ward's property and viewing the ward as a favored person in the eyes of the law. The court functions in a central role, which permits it to oversee and control all aspects of the management and protection of the disabled person's estate. The court controls the ward's person and estate, and directs the guardian's care, management, and investment of the estate. *Berger*, 166 Ill. App. 3d at 1055. The sole issue facing the trial court in a restoration proceeding is the mental condition and the best interests of the ward. See *Love*, 19 Ohio St. 2d at 114, 249 N.E.2d at 795. Thus, based on the foregoing principles, and contrary to the appellate court's reasoning, the trial court's restoration of Wellman cannot be considered to be such an "adverse ruling" to Murphy as to allow him to appeal therefrom.

We note that Murphy characterizes the final judgment order as only partially restoring Wellman. Thus, according to Murphy, his relationship to Wellman should not have ended, providing him with standing to appeal. Murphy points to the final judgment order, in which the trial court found "that John F. Wellman [was] a partially disabled person who lacks some but not all of the capacity as specified in [755 ILCS 5/11a-3 (West 1992)] and, therefore, is entitled to the appointment of a limited guardian of the person and estate." The court also found that Wellman lacked the "capacity to perform the tasks

necessary for the routine care and safety of his person or for the tasks incidental to the paying of bills, writing checks, making purchases and managing his estate at that level of performance."

However, the trial court terminated the adjudication of mental disability. In addition to the above-quoted finding, the court also found that: the extent of Wellman's confusion or dementia varied due to his anemia and blood transfusions, and that drug therapy had helped with those conditions; Wellman had the mental ability to communicate with his physician, to understand his mental and physical conditions, and to make responsible decisions concerning his health care; and that Wellman had the mental ability to make and communicate responsible decisions concerning the control, investment, and management of his financial affairs and the disposition of his estate. The trial court also found that Wellman understood the nature and consequences of placing his accounts in joint tenancy with Young, had the requisite mental capacity to enter into the transactions, and was capable of controlling or revoking the agency relationship with Young.

These findings show that the trial court found Wellman to be a partially disabled person, but not yet in need of a guardian over his estate. With help from others, *i.e.*, Young, his agent, Wellman was able to direct and manage his affairs and estate. See *In re Estate of Galvin*, 112 Ill. App. 3d 677, 681 (1983), quoting *In re Estate of Mackey*, 85 Ill. App. 3d 235, 238 (1980). Of course, the question of Wellman's mental disability was a uniquely factual question for the trial court, whose findings will not be disturbed on review unless they are against the manifest

weight of the evidence. See *Galvin*, 112 Ill. App. 3d at 681-82.

When the trial court restored Wellman on June 3, 1991, the reason for the State's interference with his affairs ceased. See *In re Estate of Hire*, 309 Ill. App. 566, 568 (1941), *rev'd on other grounds*, 379 Ill. 201 (1942). The only function for Murphy to perform was to account for Wellman's estate and deliver it to Wellman. The existence or absence of Wellman's next of kin neither diminished nor enlarged Murphy's role as guardian.

On July 3, 1991, a few days after Murphy filed his notice of appeal, he filed his account of Wellman's estate. The trial court approved the account, formally discharged Murphy as plenary guardian of Wellman's person and estate, and closed the estate. Contrary to the trial court's grant of leave to appeal, Murphy could not appeal "on behalf of the estate." After July 3, 1991, Murphy's relationship to Wellman's money and property ceased to exist. In terms of our definition of standing, after Wellman was restored and Murphy was discharged, Murphy could no longer claim an injury in fact to a legally recognized interest. See *Burgeson*, 125 Ill. 2d at 487.

Wellman's Death

If Wellman's restoration and Murphy's discharge, standing alone, did not deprive Murphy of standing to appeal, then they certainly did when considered with Wellman's death. However, the appellate court reasoned that "[a]s Wellman's property held in joint tenancy remains, we hold that the issue whether the denial of the

petition to sever the joint tenancies was error is not moot."

This reasoning was erroneous. Not only did Wellman's death render moot the issue of whether the trial court erred in denying Murphy's petition to sever the joint tenancies, but Wellman's death also deprived Murphy of standing to assign the error.

The general rule is that a guardianship necessarily terminates by the death of the ward. 57 C.J.S. *Mental Health* § 146, at 45, § 158, at 55 (1992); 39 Am. Jur. 2d *Guardian & Ward* § 54 (1968). Contrary to the appellate court's reasoning, although Wellman's property remained after his death, at issue is Murphy's *relationship to* that property. Murphy was the guardian of Wellman's estate. That relationship ended at the latest on July 3, 1991, when Murphy was formally discharged, or on August 17, 1991, when Wellman died.

Section 24-12 of the Probate Act of 1975 accords with the general rule that a guardianship terminates with the death of the ward, but subject to section 24-19. 755 ILCS 5/24-12 (West 1992). Section 24-19(a) provides: "Without order of appointment and until the issuance of letters testamentary or of administration *or until sooner discharged by the court*, a representative of the estate of a deceased ward has the powers and duties of an administrator to collect." (Emphasis added.) 755 ILCS 5/24-19(a) (West 1992). In the present case, Murphy was discharged prior to Wellman's death. Accordingly, the general rule applies.

The appellate court's order lacks any reference to this court's decision in *Burgeson*, where the court applied this

reasoning against Murphy. This court held that "Murphy's duties as Burgeson's guardian terminated upon her death." *Burgeson*, 125 Ill. 2d at 487. We further held that Murphy had a legally recognizable interest that existed following Burgeson's death – an unpaid creditor of the estate. However, that interest terminated once Murphy's office received its fees in the final account of the estate. *Burgeson*, 125 Ill. 2d at 487-88; 755 ILCS 5/18-10 (West 1992).

Murphy unsuccessfully attempts to distinguish the present case from *Burgeson*. Murphy first argues that in *Burgeson* the decedent's estate was closed, while Wellman's estate is in probate and a will contest is pending. Thus, "the decedent's estate in this case has not been closed." However, Murphy's relationship to Wellman's person and estate was closed on July 3, 1991, when Murphy was formally discharged. Murphy also characterizes himself as an unpaid creditor. However, he filed his final account of the estate, which the trial court approved. Also, in his motion for leave to appeal, Murphy stated to the trial court that he would not seek any fees from Wellman's estate for work on the appeal. *Burgeson* controls the outcome of this issue.

Murphy raises serious allegations impugning the professional conduct of Young. If Murphy suspects Young of unethical conduct, then he, like anyone else, can complain to the Attorney Registration and Disciplinary Commission. See *Burgeson*, 125 Ill. 2d at 488. However, we hold that Wellman's restoration and death deprived Murphy of standing to appeal from the denial of his petition

to sever the Wellman-Young joint tenancies. Consequently, the appellate court erred in severing the joint tenancies.

Guardian *Ad Litem* Fees

"A guardian ad litem * * * is entitled to such reasonable compensation as may be fixed by the court to be taxed as costs in the proceedings and paid in due course of administration." 755 ILCS 5/27-4 (West 1992). However, Young contends that the appellate court erred in upholding the trial court's fee award to Thiel. We note two surprising arguments of Young. He first argues that the trial court lacked authority to award Thiel fees from the funds of Wellman because she petitioned the court for fees "six months after the Estate was closed and all assets of $955.23 distributed." Young also argues that "[t]he size of this estate, $955.23, shows that an award of $4,843.75 is excessive."

These arguments completely lack merit. Of course, Wellman's "estate," in the context of his adjudication of mental disability, was not limited to the balance of the cash receipts and disbursements that Murphy handled during the guardianship. Rather, Wellman's "estate" during the time of his adjudication of disability consisted generally of all of his real and personal property (see Black's Law Dictionary 547 (6th ed. 1990), citing Uniform Probate Code § 1- 201(11); accord *In re Estate of Anderson*, 195 Ill. App. 3d 644, 650 (1990)), which totalled in the hundreds of thousands of dollars. Thiel was properly awarded fees from the assets that she was appointed to

protect. See *People v. Pasfield*, 284 Ill. 450, 458 (1918); *Nelson*, 250 Ill. App. 3d at 288.

The questions of who must pay guardian *ad litem* fees and in what amount rest within the discretion of the trial court. See *In re Estate of Dyniewicz*, 271 Ill. App. 3d 616, 622-23 (1995); *Chicago Title & Trust Co. v. Czubak*, 52 Ill. App. 3d 986, 989 (1977); *Merneigh v. Merneigh*, 2 Ill. App. 2d 352, 356 (1954). In the present case, the trial court found that Thiel's hourly rate and the number of hours that she billed were reasonable and necessary. We cannot say that the trial court abused its discretion in granting Thiel's fee petition.

Remaining Issues

We also agree with the appellate court that Wellman's death rendered moot the numerous remaining issues raised by the parties. "A case can become moot when, pending the decision on appeal, events occur which render it impossible for the reviewing court to grant effectual relief to either party." *Bluthardt v. Breslin*, 74 Ill. 2d 246, 250 (1979). The existence of a real controversy is an essential prerequisite to appellate jurisdiction. Where the issues involved in the trial court no longer exist, an appellate court will not review the cause merely to decide moot or abstract questions, to determine costs, or to establish a precedent. When, pending an appeal from a judgment of a lower court, an event occurs that renders it impossible for a court of review to grant any effectual relief, the court will dismiss the appeal. *La Salle National Bank v. City of Chicago*, 3 Ill. 2d 375, 378-80 (1954); *Tuttle v. Gunderson*, 341 Ill. 36, 45-46 (1930).

In the present case, the appeals of Downing, Young, and Murphy were pending in the appellate court when Wellman died on August 17, 1991. Downing contended, *inter alia*, that the adjudication of Wellman as mentally disabled violated Wellman's due process rights. Young also contended, *inter alia*, that the adjudication of mental disability was void for several reasons. Murphy contended, *inter alia*, that Wellman's restoration was against the manifest weight of the evidence.

Wellman was the person who was allegedly improperly adjudicated mentally disabled, and was the person who was allegedly improperly restored. These issues obviously became moot with Wellman's death.

For the foregoing reasons, the judgment of the appellate court in cause Nos. 80182 and 80184 is reversed insofar as it severed the Wellman-Young joint tenancies, and affirmed insofar as it dismissed the remaining issues; the judgment of the appellate court in cause No. 80246 is affirmed.

Nos. 80182, 80184 – *Appellate court affirmed in part and reversed in part; circuit court affirmed.*
No. 80246 – *Affirmed.*

CHIEF JUSTICE BILANDIC took no part in the consideration or decision of this case.

JUSTICE HEIPLE, concurring in part and dissenting in part:

Having initially been adjudicated to be an incompetent, Mr. Wellman was made a ward of the court and a

guardian was appointed. Later, the wardship was terminated and the guardian was discharged. The guardian appealed. Soon thereafter, Mr. Wellman died.

The majority opinion holds, in part, that the termination of the wardship and the discharge of the guardian deprived the guardian of his standing to appeal. I disagree as a matter of public policy. Trial courts can be wrong. In this case, for instance, if the trial court was in error and misperceived Mr. Wellman's true condition, the only way to protect his estate and to remedy the situation would be to afford the discharged guardian a right to appeal. We know, in fact, that, at an earlier time, Mr. Wellman was found to be elderly, ill, confused, and unable to properly care for himself. Surely, a restoration decision should at least be subject to the possibility of review. Otherwise, an erroneous order of restoration might facilitate the wasting and dissipation of the former ward's estate. If, as the majority rules, the former guardian has no right to take an appeal, then, quite simply, there is no appeal since no one else is in a position to bring it.

I, of course, agree with the majority's position that the death of the ward terminated the guardian's standing to appeal. However, on the salient and important point of whether a guardian should be allowed to appeal a restoration order, I respectfully dissent. As a matter of public policy, a guardian should retain the right to appeal the restoration of a person previously declared to be incompetent.

JUSTICE McMORROW joins in this partial concurrence and partial dissent.

APPENDIX B

THIRD DIVISION
MARCH 15, 1995

Nos. 1-90-3008; 90-3011; 91-2055; 1-92-1983

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE ESTATE OF JOHN WELLMAN, A Disabled Person. No. 1-90-3008 (JOHN F. WELLMAN, Appellant, v. PATRICK T. MURPHY, Public Guardian of Cook County, Appellee.) No. 1-90-3011 (SAMUEL H. YOUNG, an Interested Party, Appellant, v. PATRICK T. MURPHY, Public Guardian of Cook County, Appellee.)	Appeal from the Circuit Court of Cook County No. 90 P 03251 Docket 228 Page 008 Honorable Robert D. Ericsson, Judge Presiding.

No. 1-91-2055

(PATRICK T. MURPHY,
Public Guardian of Cook County,

Appellant,

v.

SAMUEL H. YOUNG,
an Interested Party,

Appellee,

and

JOHN F. WELLMAN,

Appellee.)

No. 1-92-1983

(SAMUEL H. YOUNG,
an Interested Party,

Appellant,

v.

SANDRA L. THIEL,
Guardian Ad Litem,

Appellee,

and

PATRICK T. MURPHY,
Public Guardian of Cook County,

Appellee.

ORDER

These consolidated appeals arise out of the appointment of a guardian for John Wellman and a subsequent

order finding him only partially mentally disabled. Wellman's attorney became a joint tenant with Wellman on Wellman's accounts, and at issue is the propriety of the attorney's actions. We find most of the issues to be moot because of Wellman's death. We reverse the trial court's denial of a petition to sever the joint tenancies.

On March 1990, Patrick J. Murphy, Public Guardian, filed a petition for appointment as the guardian for Wellman, who was an allegedly disabled 89-year-old person suffering from manic psychosis, mild dementia, and blood malignancy. On April 3, 1990, an order was entered appointing Sandra Tisel as guardian *ad litem* ("gal") for Wellman. She was ordered to interview Wellman, inform Wellman of the contents of the petition and of his rights, file a written report with the court, and be present at the May 8, 1990, hearing.

On April 6, 1990, Wellman was served with the summons and copy of the petition.

On May 8, 1990, the gal filed a report with the court that stated the following. She tried to interview Wellman on April 17, 1990. She advised him orally and in writing of his rights. Wellman did not want to talk to her. She interviewed him on May 1, 1990, at which time he was much more cooperative. She spoke loudly, and he heard most of what she said. She again advised him of his rights. He was oriented about the day of the week, the month, the year, and the name of the president. He did not remember the year of his birth or whether he had a checking or savings account at the Northern Trust bank. He did not know how much money he had in the bank because a friend handled it for him. She was unable to

determine if his account was in joint tenancy with the friend, and Wellman seemed to be confused. Wellman mentioned participants, but he did not know who they were. He said that he did not "return a lot of statistics." His reply did not make sense, but it was possible that he did not hear her correctly. He was confused about the appointment of a guardian. Some, but not, all of his confusion was due to a serious hearing impairment. He did not seem able to understand his affairs.

The gal also interviewed a nurse and administrator at the nursing home, who stated that Wellman was forgetful. The administrator said that Wellman was confused. She also read a social worker's report dated February 14, 1990, which noted Wellman's mistrust of his doctor, paranoia, and his feeling that it was a waste of time to change clothes and wash up. The gal concluded that Wellman needed a guardian of the estate and person.

On May 8, 1990, the court appointed Patrick Murphy as plenary guardian for Wellman.

On June 13, 1990, Alan J. Forest and Robert J. Downing filed an appearance for Wellman. Samuel H. Young filed an appearance as an "interested party" on the same date.

Young filed on the same date a petition to vacate the order appointing a plenary guardian for Wellman and alleged the following. Young was an attorney who had an attorney-client relationship with Wellman. In December 1988, Wellman requested Young to act as his agent and attorney, and he executed a durable power of attorney on December 27, 1988. In November 1989, Wellman asked Young to work with him as his "partner" in managing his

property and to help look after him for the rest of his life. Wellman advised Young that he wanted to put his property in joint tenancy with right of survivorship so that Young would receive the property on the death of Wellman. A letter agreement was entered into December 1, 1989, in which Young agreed to assist Wellman with managing his assets and to look after Wellman for the rest of his life. In December 1989 and January 1990, a brokerage account, U.S. Treasury bills, and bank accounts were placed into joint tenancy with right of survivorship in Young. Young argued in part that Wellman was still capable of making personal decisions with respect to both his person and his estate and that it was not appropriate to appoint a guardian.

On June 14, 1990, Wellman, by his attorneys, moved to restore him and to revoke guardianship. Wellman alleged that he was not a disabled person and was fully able to manage his person and estate.

On July 24, 1990, Wellman filed a motion to vacate the order of May 8, 1990, appointing the Public Guardian.

On July 24, 1990, the Public Guardian filed a petition to revoke the agency agreement between Wellman and Young, to remove Young as agent, and to sever the joint tenancies with right of survivorship to Young of all assets belonging to Wellman as a result of undue influence and fraud.

On July 24, 1990, the gal filed an appearance for Wellman.

A hearing was held beginning in January 1991. There was extensive testimony concerning Wellman's mental

and physical condition. Only that portion of the testimony relevant to the issue of Young's alleged undue influence in connection with Wellman entering into the joint tenancy agreements will be summarized.

Sergeant James McKenna testified to the following at the hearing. As a police officer, he had had contact with over a thousand senior citizens. A part of his duties was to visit nursing homes. He saw Wellman on five or six different occasions beginning in January 1988 and ending in February 1989. He had a conversation with Wellman in February 1989. Wellman told him that he was worried about Young taking his money. Wellman told him that Young kept wanting Wellman to sign a power of attorney document.

When asked whether McKenna had an opinion as to whether Wellman suffered from mental impairment, he stated that: "this guy was soft as a grape, street talk, okay. This is plain street talk, he was soft." He called the Public Guardian's office because he did not think that Wellman could handle his own affairs. Wellman acted confused. Wellman could have been taken advantage of with respect to financial decisions. Wellman could not adequately make financial decisions.

An affidavit of McKenna was admitted into evidence. He swore that he believed that in February 1989 Wellman suffered serious mental impairment, was senile, and was in a situation where he could easily be taken advantage of by other parties.

Pauline Brennan testified to the following. She was employed at an outreach program to visit people in nursing homes. She had a bachelor's degree in sociology and

social work. She first met Wellman in November 1989 at his nursing home. She would visit with Wellman twice a week at his nursing home in the period from November 1989 until the end of January 1990. He was not able to tell her how he came to live at the nursing home. In early November 1989, he knew he had lived at Lawrence House but could not explain how he got to Lawrence House or where he lived before that. He was very confused about this matter. In a conversation with Wellman in early November 1989, he stated that he had a will, that he was leaving everything to Young, and that Young was a crook. He could not explain why he was leaving his money to a crook. He worried about his money, which was his whole life and all he ever wanted to talk about. She once saw a paper on which he had written: "I want Sam Young to be my guardian." He frequently asked her to take him home with her to live.

Judith Singson testified to the following. She was the director of nursing at the nursing home. When Wellman was a resident there, she would see him several times a day. Wellman was able to carry on a normal conversation with her; he was very alert. He was oriented and seemed to know what he was doing. He was very hard of hearing. He was forgetful. Wellman suffered from paranoia and dementia. Wellman's nursing home records indicated that Wellman suffered a severe mental illness. A resident assessment form dated December 18, 1989, noted senile dementia and organic psychosis.

Francisco J. Chavez testified to the following. He had been the administrator of Lawrence House since April 1989. He first met Wellman in April 1989 when he was a tenant there. Wellman's health deteriorated rather

quickly in the last month of his stay at Lawrence House. Young was Wellman's only visitor. Toward the end of November, Chavez thought that Wellman could not live independently because he had been ill, he complained that he was dying, he was not eating properly, and he needed daily attention.

Ann Parici testified to the following. She was employed previously as an assistant attorney general. She met Wellman December 21, 1989, at his nursing home. Wellman said he went to the Federal Reserve Bank with Young but he was not sure of the transactions. He thought he had transferred or reinvested money. She asked him whether he knew that Young was a joint owner of any accounts, and he said that Young was not. He said that he and Young did not own any money together at the Federal Reserve Bank. He knew that Young had withdrawn money from the Northern Trust Bank and reinvested it in the La Salle Bank but he did not know why. He said he had been banking at the Northern Trust Bank since he was a young man, that he did not want to stop banking there, that he was worried about the transactions, and that he did not approve of the transactions.

Parici asked Wellman if he had authorized any of the transactions. He said that he signed all kinds of papers that Young gave to him but that he did not read the papers. He did not know what he had signed. He said that he did not have copies of the documents and that Young maintained all the papers. He said that Young always wanted to be a business partner of his. He thought that Young had touched the money and also "got his hands on" the stock. Young "ingratiated himself" on

Wellman. Wellman thought he had possibly been swindled.

Sam Young testified to the following. He first met Wellman in the 1960's when Wally Johnson contacted him about Wellman's question about stock. He next became involved with Wellman in 1986, when Johnson called him about Wellman's desire to transfer assets of a woman, Carol Holcomb, with whom Wellman lived, to Wellman. In 1986 Young drafted a power of attorney for Wellman designating Johnson as the agent. He prepared Wellman's income tax returns since 1987. In 1987, he advised Wellman about the desirability of having a durable power of attorney for someone to make health care decisions in case he became incapacitated.

In 1987, he advised Wellman about the advisability of having a will. He prepared a draft of a will; Wellman gave him names of beneficiaries, including Ada Fields, Paul Larson, and Andrew Vlahos. Charities were also potential beneficiaries. Wellman changed the will that he eventually executed. In November 1987, Wellman signed a will that was prepared by Young. The will gave specific bequests to individuals and charities. Later, the will was cancelled. In December 1988, Wellman called him again about writing up a will. Wellman gave Young a document indicating that he wanted to name four persons as beneficiaries of the will. A note indicated the beneficiaries and stated that Young was to get "allocations of amounts to himself in probating and distribution of my will to the above and to Sam Young." He received a document from Wellman on May 16, 1989, indicating possible beneficiaries. Young was one of the names listed. Wellman wrote on September 12, 1988, in a note that he had revised the

contents of his will, and he listed bequests to individuals, including "Sam Young for $35,000."

In May 1989, Young brought Robert Brody, an attorney, to see Wellman. Because Wellman was talking about including Young in his will, he told Wellman that it would be appropriate for him to hire another attorney to draw the will. When Wellman met Brody, Wellman was not very cooperative and not very interested. Brody left his business card but Wellman never contacted Brody.

On December 17, 1988, Young advised Wellman that it was desirable to have a durable power of attorney, and Wellman selected Young. Wellman signed a durable power of attorney on December 27, 1988, giving Young authority to endorse and deposit checks, to draw checks on Wellman's checking account, and to make withdrawals from Wellman's savings account and any banking institution to pay bills and debts owed by Wellman. The power of attorney also gave Young the right to make health care decisions.

Young had conversations with Wellman regarding putting his property into joint tenancy with Young around the end of October 1989. Wellman said that he did not have anyone else to leave his property to on his death. He said that Young was the most "continuous" friend he had. Wellman said that he did not trust the probate courts and did not want to execute a will. Young told Wellman that he did not have to leave his property to Young and asked whether he did not want to leave something to Larson, Vlahos, Johnson, or Ada Fields. Wellman said that he did want to and that he wanted Young to be his partner to help manage his affairs. A November 14,

1989, letter (prepared by Young) from Wellman stated that he wanted to leave all his property in joint tenancy to Young. In a letter prepared by Young for Wellman, Wellman stated that, in the event Wellman became incapacitated, Wellman wanted Young to look after him. Young had Wellman's letters typed and prepared for Wellman's signature because Wellman did not have a typewriter and did not type.

Young contacted Johnson in October or November 1989 so that Johnson could meet with Wellman to confirm that Wellman's intentions were as he told Young, *i.e.*, to put his property into joint tenancy with Young and Young to look after Wellman for the rest of his life. Johnson told Young that he met with Wellman who confirmed this desire.

In a December 1, 1989, letter from Young to Wellman, Young stated that he agreed to look after Wellman, that he would not spend Wellman's money or use Wellman's property for any purpose other than for Wellman's health and benefit, that Wellman could make a will and revoke the joint tenancy if Wellman desired, and that Young would arrange to make gifts to others at Wellman's death. A December 1, 1989, letter from Wellman to Young confirmed that in consideration of Young's assistance and work for Wellman, Wellman would arrange to place his property in joint tenancy with the right of survivorship in Young.

Wellman signed the joint tenancy authorization on November 14, 1989, and the agreement on December 1, 1989. When the joint tenancy document was executed, he

believed Wellman to be competent. Before Wellman executed the December 1, 1989, agreement, Young asked Wally Johnson to meet with Wellman. Young did not refer Wellman for independent legal advice.

Young stated that he found Wellman on November 2, 1989, on the floor of his apartment. Young called his own physician, Dr. Stern, and asked him to take a look at Wellman. Wellman was taken to Evanston Hospital on November 4, 1989, and remained there until November 8, 1989. Dr. Stern wrote to Young that Wellman's medical problems included age-related debility, senile brain dysfunction, underlying personality disorder, and malnutrition, which would lead to an increase in paranoid delusions, alienation from people involved in his care, and an eventual spiraling decline of function.

Wellman told him that he had no one else to leave the property; Wellman had no family. Young had helped Wellman in non-legal matters without payment. He had performed legal services for Wellman since 1986 without payment. Part of the consideration for the joint tenancy agreement was the considerable amount of time that Young spent driving to help Wellman with his problems. Young gave attention to Wellman's care.

In Young's conversations with Wellman concerning Wellman's assets, Wellman always appeared oriented. Young thought that Wellman was competent.

The last approximate current worth of Wellman's estate was $840,000. A Merrill Lynch brokerage account with stock was placed into joint tenancy by an authorization signed by Wellman in November 1990. Young withdrew the money from Wellman's account at the Northern

Trust Co., which refused Wellman's application for a joint account with Young. The money was in the form of a cashier's check to Wellman, and Young deposited it into a joint account at the La Salle National Bank, after discussing it with Wellman. When the Northern Trust Bank subsequently acknowledged the joint tenancy arrangement, they transferred the money back.

The August 10, 1990, affidavit of Robert S. Brody was read into the record. Brody swore to the following. Young told him that Wellman wanted to include Young as a beneficiary in his will, and he advised Wellman that he should engage another attorney to draw the will. Young introduced Brody to Wellman. Brody advised Wellman that if he wanted a will, Wellman should contact him. Wellman never contacted Brody.

Wellman testified to the following. He gave Young the durable power of attorney on December 18, 1988, and he knew that he could revoke it. He wanted the power of attorney to be "unirrevocable, non-cancelable." He praised Young as wonderful, talented, ambitious, upstanding, and clean. He wanted Young to look out for him for the rest of his life. He wanted Young to have his property when he died. He wanted Young to be his joint tenant on the $650,000 on the treasury bills and on his Merrill Lynch account. When asked about the meaning of the December 1, 1989, agreement with Young, he stated that: "A friendly letter, that's all. It's not final. There is no finality there." He wanted to revoke the agreement. There was no agreement to keep his Northern Trust bank account in joint tenancy with Young. When asked whether he wanted to keep the stock in joint tenancy with right of survivorship with Young, he responded:

"Not exclusive. It's included in Sam Young's will to his wife, when he dies, that she participate in that.

No, he's not that angel lilly. Nobody is.

That's a hard question to answer. None of us are mandates. All we want to do is have perpetuation in the right places after we leave here, providing our conscience is clear and we had hurt nobody.

And in the meantime, we will go like – stroll along without any mishaps. Never in court for any misdemeanor. I never been in the courts till I hit Sam Young.

I never been indicted, never been talked down in the court and I never had the necessity to go to court.

And that is pretty sure, good percentage of Sam life's as well as mine."

He did not recall putting his treasury bills, bank accounts, and stock in joint ownership with Young with right of survivorship. When asked whether he put these assets into joint ownership, he stated:

"No. I might have done it, though. I can't be positive on all these things here.

But the role conjunctured to be of good avail, and good feelings for everybody concerned, whether you're on the south side at 22nd Street or north of 22nd Street.

I draw no line as to how I want to flex this thing. That's a big job for a guy that's 90 years old, but that's the best I done."

Paul Larson testified at the February 15, 1991, hearing to the following. He was a second vice president of the Northern Trust Company. He met Wellman in 1984 or 1985. On December 7, 1989, he told Young that he had not changed Wellman's account into a joint survivorship account as requested. He was suspicious of the transaction.

Andrew Vlahos testified to the following. He was an assistant manager at the Federal Reserve Bank of Chicago. He first met Wellman in 1985 when he requested some assistance in reinvesting a treasury bill account. In 1986, Wellman created a treasury direct account, which was a safekeeping account as a means of holding securities. Northern Trust Company was the bank used as the depository bank. He would renew treasury bills by going to Vlahos' office. He met with Wellman and Young on December 7, 1989, and Wellman asked Young whether Vlahos was "Andy." Wellman asked him if it were possible to add a joint owner on his account, and Vlahos gave him the form. A request to change the registration to Wellman and Young with right of survivorship was later processed. Wellman told Vlahos that he knew his property was in joint ownership, that if he died his property would go to Young, and as long as Wellman and Young were in harmony, that was the way it was to be.

On September 23, 1990, Vlahos had a meeting with Wellman and Young in reference to the reinvestment of a $120,000 Treasury Bill. He explained to Wellman how title to the securities could be held so that either Wellman or Young could negotiate the securities or that the securities could be held with both persons required to sign for any change. Wellman said he wanted to register the securities

in the name of Wellman and Young so that, if anything happened to Wellman, the security would go to Young. Wellman's physical capabilities had diminished over the years. Wellman talked slower each time he came in. Vlahos started to write down questions for Wellman because of the hearing problem. He thought that Wellman did pretty well for a man of his age.

It seemed highly irregular to him to have Wellman's attorney added to Wellman's account as a joint owner. Vlahos was also suspicious because he received a telephone call from Larson stating that Young wanted to have himself made a joint owner on the account at Northern Trust. In addition, Wellman had asked Young if Young had reinvested the $250,000, and Young stated to Wellman that he did. Young and Vlahos had not talked about the $250,000 but only how to add a joint owner on the account. For these reasons, he referred the matter to the bank's legal department.

Wallace D. Johnson testified to the following. He knew Wellman for 40 years and was his friend. He provided broker services to Wellman. Johnson knew Young for 40 years socially and as his firm's attorney. Young's reputation for honesty was impeccable. He introduced Young to Wellman 25 to 30 years ago. Wellman was a very frugal man. Wellman had told him that he did not like wills, that he did not like probate, and that he did not like to pay legal fees. In a conversation with Wellman in 1990, Wellman stated that he did not want his money to go to the State of Illinois. On one occasion Wellman tore a drafted will up, and on another occasion Wellman refused to sign the will. Wellman could not be coerced into doing anything that he did not want to do. In 1988 or

early 1989, Wellman told Johnson that he wanted Young to be his partner.

Johnson knew of a joint tenancy arrangement that Wellman had with Carol Holcomb. Prior to that, Wellman was involved in a joint tenancy arrangement with his sister. Prior to that, Wellman was involved in a joint tenancy relationship with Wellman's parents. Wellman told him that he liked joint tenancies because it avoided probate.

Before Wellman executed documents placing his estate in joint tenancy with Young, Young discussed the subject with Johnson. Young asked Johnson to verify the joint tenancy situation with Wellman, and Johnson met with Wellman at the hospital. Johnson asked Wellman if he wanted to have his assets in joint tenancy. Wellman said he wanted to have a joint tenancy with Young because Young was his friend and partner and the only person who had looked after him for the last five or six years. Johnson asked Wellman if he wanted a will, and Wellman still did not want a will.

Johnson told Wellman that it was not necessary to make Young a joint tenant because Young would take care of him anyway. Young told Johnson that he would take care of Young with or without joint tenancy. Johnson discussed with Wellman his ability to revoke the joint tenancy, and Wellman responded that he knew all about that. Johnson also told Wellman that Wellman could give assets to other persons besides Young, and Wellman responded that he would get back to that. Wellman was lucid and responsive during this conversation. Johnson's opinion was that Wellman knew exactly what he was

doing. As late as December 8, 1990, Wellman was competent and knew exactly what he was doing with respect to his money.

Dr. Thomas Stern testified to the following. He was Young's son-in-law. He examined Wellman in the hospital. In a November 10, 1989, letter to Young, Dr. Stern stated that Wellman had age-related debility, senile dysfunction, and an underlying personality disorder. In the hospital, Wellman had episodes of confusion and agitation. Wellman's memory testing was not completely normal. The episodes of confusion occurred several times a day for short times. The dysfunction would interfere with Wellman's ability to make decisions during an episode but otherwise not. The combination of Wellman's overall decline, the senile brain changes, and the underlying personality disorder led to a worsening alienation and paranoid delusions. At various times, Dr. Stern noted in his physician's notes the term psychosis to identify Wellman's mental condition. Psychosis meant that a person had lost touch from reality. Wellman's psychosis was evidenced by delusions of a paranoid type concerning health care or money. At the time of the letter, Dr. Stern did not believe that the psychosis affected his ability to make decisions. Wellman probably had the psychosis even before he became older and debilitated. Progress notes dated November 15, 1989, indicated that Dr. Stern had prescribed an anti-psychotic drug for Wellman.

Dr. Stern noted on a November 9, 1989, nursing home assessment form that Wellman probably had senile dementia. He stated Wellman had a mild dementia that did not interfere with his ability to make decisions or to

communicate. Sometimes Wellman would become paranoid and hostile. When that occurred, it would be a substantial functioning handicap. Psychosis was the gross impairment of reality testing and the creation of a new reality. Psychosis was a mental disorder in which the impairment of a mental function had developed to a degree that interfered greatly with insights, the ability to meet demands of life, and the ability to maintain adequate contact with reality.

Dr. James L. Cavanaugh, Jr., testified to the following at the May 8, 1991, hearing. He was a psychiatrist. He met at Downing's office with Young around August 11, 1990. He met Wellman on the same day. The essential features of dementia were impairment of short and long term memory associated with impairment in abstract thinking, impaired judgment, or disturbances of higher cortical functions, or personality changes. The disturbance was severe enough to interfere significantly with work or usual social activities and relationships with others. There were mild, moderate, and severe degrees of dementia. Psychosis was not equated with incompetency.

The trial court entered on June 3, 1991, its final judgment order. The trial court made the following relevant conclusions of fact and law. The Public Guardian was an interested person with legal standing to petition for the revocation of the durable power of attorney. In November 1989, Wellman suffered from mild dementia, paranoia concerning efforts to steal his money, paranoia about his health, periodic episodes of confusion and anxiety, and severe anemia. From November 1989 through May 8, 1991, Wellman was substantially oriented to time, place, and person, was aware of the persons present and

the circumstances of their being with him, was sociable and wanted to converse, could read and knew what he read, had a severe hearing problem, understood questions when he could hear them, answered questions in an appropriate manner, was aware of the amount of his assets and of the nature of his investments, and knew what he was "about" in controlling his investments and in the location of his assets. Due to these conditions, Wellman would become tired, exhausted, and would lapse into confusion or dementia and his communication would become rambling and meaningless. The extent of his dementia varied due to his anemia and blood transfusions.

The judgment further provided the following. Wellman was aware that he had no heirs and no will or trust and that without directing the disposition of his estate, the State would receive his assets. Wellman had the mental capacity to make responsible decisions concerning his financial affairs and the disposition of his estate. It was not proved by even a preponderance of the evidence that Wellman had the ability or capacity to perform the tasks necessary for the routine care and safety of his person or for the tasks incidental to the paying of bills, writing checks, making purchases, and managing his estate "at that level of performance." Wellman was a partially disabled person and was entitled to the appointment of a limited guardian of the person and estate.

The judgment further provided the following. Young disclosed all pertinent facts concerning the joint tenancy arrangements with Wellman. Wellman had sufficient experience as an accountant and non-legal independent advice given to him by Larson, Vlahos, and Johnson,

concerning the joint tenancy arrangements before entering into the transactions. Wellman understood the nature and consequences of placing his property in joint tenancy with Young with right of survivorship. Wellman had the requisite mental capacity to enter into the transactions. Wellman acted freely and voluntarily in establishing the joint tenancies. The consideration for the agreement was adequate and valuable and therefore sufficient to establish a contract. Young sustained his burden to rebut the presumption of fraud and undue influence. Young did not breach his fiduciary duty to Wellman by entering into an agreement with him on December 1, 1989, to place Wellman's property in joint tenancy with a right of survivorship. Petitioner failed to prove by a preponderance of the evidence that Wellman lacked the capacity to control or revoke Young's agency.

The final judgment ordered the following. The petition to revoke the agency under the power of attorney and to declare void the December 1, 1989, agreement was dismissed. Wellman's petition to be restored was granted, and the May 8, 1990, order of adjudication was terminated.

On June 13, 1991, the Public Guardian was granted leave to appeal the final judgment order. It appealed on June 27, 1991.

On July 3, 1991, the Public Guardian was discharged as guardian of the estate and person of Wellman.

On August 17, 1991, Wellman died.

According to a report to the trial court by Young, Wellman executed a will on August 7, 1991.

On January 30, 1992, the gal filed a petition for fees for the time between April 1990 through September 16, 1991. The gal claimed over 38.75 hours spent at $125 an hour for a total of $4843.75. A schedule of time was attached detailing the work done. Young moved to dismiss the petition for fees, and the motion was denied. The trial court stated at the hearing that the appointed gal appeared in court at appropriate times, she made her reports, and she protected the interests of Wellman. The trial court further found that the court's finding as to the disability of Wellman was consistent with the gal's reports. The trial court also found that the fees requested were reasonable and that she acted carefully to keep the amount of chargeable time down. Her petition was approved.

Wellman's appeal: No. 90-3008

Wellman argues the following in his appeal: (1) Murphy's appointment as plenary guardian violated the Power of Attorney Act (755 ILCS 45/4-1 *et seq.* (Smith-Hurd 1992)) and the Probate Act of 1975 (the Probate Act) (755 ILCS 5/1-1 (Smith-Hurd 1992) *et seq.*); (2) the trial court erred in granting the Public Guardian summary judgment on Wellman's motion to vacate; (3) Wellman's due process rights were violated; (4) notice of the Public Guardian's petition for appointment as guardian was not served on Young or anyone at Wellman's residence; (5) he had the right to counsel; (6) the gal took an adversary position to Wellman at the hearing; (7) the doctor who examined Wellman in connection with the guardianship petition was not present as required; (8) there was not good cause shown to the trial court why Wellman was not

present at the hearing; (9) the trial court should not have found Wellman disabled in his absence because it could not observe him or inquire as to his abilities; and (10) his attorney was not present at the hearing. Wellman sought as relief the reversal and vacating of the October 16, 1990, order denying the motions for summary judgment on vacating the guardianship order and of the May 8, 1990, order appointing the Public Guardian as Wellman's plenary guardian.

Wellman argues in a motion to dismiss that appeals 90-3008 and 90-3011, and part of 91-2055 should be dismissed on the ground that they are moot. An issue is moot where no actual rights or interests of the parties remain or where events occur that render it impossible for the reviewing court to grant effective relief. (*Rabel v. Illinois Wesleyan University* (1987), 161 Ill. App. 3d 348, 363, 514 N.E.2d 552.) The person for whom a plenary guardian was allegedly appointed improperly no longer is living. We agree that appeal 90-3008 has become moot because of Wellman's death.

Young's appeal: No. 90-3011

Young argues in his appeal that: (1) the May 8, 1990, order was void because it was entered in violation of Wellman's right of privacy, right to be free of unlawful searches, due process rights, and rights under the Illinois Constitution; (2) the May 8, 1990, order was void because it was based on an unlawful medical examination; (3) the gal's failure to effectively represent Wellman deprived him of a fair trial; (4) the failure to disclose certain facts to the court amounted to fraud on the court and voided

the May 8, 1990, order; and (5) the Public Guardian had no standing to serve as a guardian for Wellman.

We find that these issues were also rendered moot with the death of Wellman.

Public Guardian's appeal: No. 91-2055

The Public Guardian argues in its appeal that: (1) the trial court's restoration order was against the manifest weight of the evidence, which demonstrated Wellman's significant and continuing disability; (2) the trial court erred in refusing to revoke Young's agency and to sever the joint tenancies; and (3) that numerous trial court rulings prejudiced the Public Guardian.

As Wellman's property held in joint tenancy remains, we hold that the issue whether the denial of the petition to sever the joint tenancies was error is not moot. The other issues raised in this appeal are moot.

The Public Guardian argues that the trial court erred in not severing the joint tenancies where Young failed to rebut the presumption of fraud and undue influence over Wellman.

Wellman and Young initially respond that the Public Guardian lacked the standing to appeal because he did not appeal the July 3, 1991, order of discharge and because he had no personal stake or interest in the outcome of the controversy as a discharged guardian. Therefore, they argue that the Public Guardian's appeal should be dismissed.

The Public Guardian replies that he had standing to pursue the appeal, and argues the following in support.

He had a direct and substantial interest as a guardian of a disabled adult to assert that the trial court erred in refusing to revoke Young's agency with his ward. He was a party to the proceedings and can appeal whether or not he was actually aggrieved by the judgment. (*St. Mary of Nazareth Hospital v. Kuczaj* (1988), 174 Ill. App. 3d 268, 270-71, 528 N.E.2d 290.) Any doubt as to the right to appeal is to be resolved in favor of the appellant. (*Chas. Ind Co. v. Cecil B. Wood, Inc.* (1965), 56 Ill. App. 2d 30, 43, 205 N.E.2d 786.) The trial court would not have entered the discharge order if in so doing it would have barred the Public Guardian's appeal for which leave had been granted. The Public Guardian was a party who had been aggrieved by an adverse decision. Because the decedent's estate remains open with a will contest pending, Wellman's demise likewise does not deprive the Public Guardian of standing in this case. The trial court's order allowed Young to dissipate an estate for which the Public Guardian contends he retained responsibility.

We first find that the Public Guardian had standing to appeal the denial of his petition to sever the joint tenancies. The Public Guardian had an interest in seeking that relief because the Public Guardian had been appointed plenary guardian of Wellman and because he believed that his ward was incapable of handling his own affairs. The discharge of the Public Guardian did not deprive the Public Guardian of the ability to appeal an adverse ruling.

As a matter of law, there is a fiduciary relationship between an attorney and her client. (*McFail v. Braden* (1960), 19 Ill. 2d 108, 116, 166 N.E.2d 46.) where an attorney entered into a transaction with the other party to

the fiduciary relationship, and the attorney benefitted, a court must determine whether the transaction was fair. (*McFail*, 19 Ill. 2d at 117.) The important factors in making this determination are whether: (1) the fiduciary made a full and frank disclosure of all the relevant information that he had; (2) the consideration was adequate; and (3) the principal had independent advice before completing the transaction. (*McFail*, 19 Ill. 2d at 117-18.) There is a presumption that a transaction between a fiduciary and another party, where the dominant party has profited, is fraudulent. (*Clark v. Clark* (1948), 398 Ill. 592, 601.) The presumption is rebutted by clear and convincing proof that the dominant party has exercised good faith and has not betrayed the confidence reposed in him. (*Clark*, 398 Ill. at 601.) A transaction is fraudulent if the person with a dominant influence over the other person in the fiduciary relationship induces the other to execute an instrument that he would not have made otherwise. *Schueler v. Blomstrand* (1946), 394 Ill. 600, 614-15.

We find that there was insufficient evidence to overcome the presumption of undue influence by Young because there was not full disclosure of the consequences of placing Wellman's property in joint tenancy. The record does not disclose that Wellman knew that Young, as a joint tenant, could withdraw money in any amount and for any purpose. It cannot be assumed that Wellman understood this important fact based on prior tenancy arrangements. (See *Klaskin v. Klepak* (1989), 126 Ill. 2d 376, 390-91, 534 N.E.2d 971 (attorney did not advise client that her being the beneficiary of a land trust would remove the property from the probate estate and that a beneficiary would not have a legal obligation to retire debts with

the equity in the property).) Young's letter promising Wellman that he would only use the money for Wellman's benefit did not alter Young's ability as a joint tenant to withdraw money for any reason.

Although we do not reach the issue whether Wellman was mentally disabled when he entered into the joint tenancy arrangements, we do note that there is sufficient evidence that Wellman at least at times may not have understood his affairs, had memory lapses, and was confused. It cannot be concluded that the transactions were made with Wellman's complete understanding of the consequences and without undue influence of his attorney.

Young argues that there is a presumption of donative intent in a joint tenancy and that a fiduciary relationship between the joint tenants does not rebut this presumption. (*In re Estate of Wilkening* (1982), 109 Ill. App. 3d 934, 940, 441 N.E.2d 158.) But there is a presumption of undue influence when an attorney benefits from a transaction with his client, and this presumption remains in the face of the donative intent presumption. Even if Wellman presumably intended a gift to Young, undue influence could still be found. Furthermore, because of the need for an attorney to avoid even the appearance of impropriety, the presumption of donative intent should not apply where an attorney is the joint tenant with his client.

The joint tenancies are therefore hereby severed.

Young's appeal: No. 92-1983

Young appeals from the award of attorneys fees to the gal. Young argues the following. The trial court

lacked the authority to award gal fees of $4,843.75 in a closed estate where the gross estate was valued at only $955.23. On July 3, 1991, the Public Guardian filed his final account showing the receipt of checks in the amount of $955.23 and the distribution to Young of this money under the power of attorney from Wellman. Also on that date, the Public Guardian was discharged and the estate was closed. The gal filed her petition for fees on January 30, 1992, which was after the estate was closed and all the remaining assets were distributed. There was no estate left from which to pay the fees. The gal lacked diligence in failing to file the petition for fees before the estate was closed. Based on the small size of the estate, the award of the attorneys fees was excessive.

Section 11a-10(a) of the Probate Act (755 ILCS 5/11a-10(a) (Smith-Hurd 1992)) provides that the trial court may allow the gal reasonable compensation. Young has not provided authority for his position that the gal was required to file her fee petition at an earlier date or that the fees could not be paid out of Wellman's assets after the close of the estate. Therefore, Young's arguments are rejected.

The order denying Young's motion to dismiss the guardian *ad litem* fee petition and granting the guardian *ad litem* fee petition is affirmed.

Appeal 90-3008 is dismissed; appeal 90-3011 is dismissed; appeal 91-2055 is dismissed in part; the judgment of the trial court in appeal 91-2055 is affirmed in part, reversed in part, and remanded; and the judgment of the trial court in appeal 92-1983 is affirmed.

CERDA, J., with RIZZI, J., and TULLY, J., concurring.

APPENDIX C

NO. 80182, 80184 (Consolidated)

IN THE SUPREME COURT OF ILLINOIS

IN RE ESTATE OF JOHN WELLMAN,

A Disabled Person (Now Deceased),

PATRICK T. MURPHY, COOK COUNTY PUBLIC GUARDIAN, as Guardian of the Estate and Person of JOHN F. WELLMAN,

Plaintiff-Respondent,

-vs.-

SAMUEL H. YOUNG, an Interested Person,

and

SAMUEL H. YOUNG, as Executor of the Decedent's Estate of JOHN F. WELLMAN,

Defendants-Petitioners.

Appeal From A Decision of the Appellate Court, First District, No. 91-2955. There Heard on Appeal from the Circuit Court of Cook County, Probate Division, No. 90 P 3251.
The Honorable Robert D. Ericsson, Judge Presiding.

PETITION FOR REHEARING

PATRICK T. MURPHY
LEE ANN LOWDER
KATHLEEN G. KENNEDY
OFFICE OF THE COOK COUNTY PUBLIC GUARDIAN
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ORAL ARGUMENT REQUESTED,
IF PETITION IS ALLOWED

Patrick T. Murphy, the Public Guardian of Cook County, respectfully petitions for rehearing of this case pursuant to Supreme Court Rule 367. He asks this Court to reconsider the issue of standing and to affirm the decision of the Appellate Court severing the joint tenancies. Because the standing issue was not addressed during the oral argument before this Court, the Public Guardian respectfully asks that, at a minimum, this Court grant rehearing and allow additional briefing on the issue of standing. If rehearing is granted, the Public Guardian asks this Court to allow additional oral argument on this important question. Rehearing is essential primarily because this Court's ruling on standing may have serious constitutional implications about which this Court should be thoroughly informed.

INTRODUCTION

The public interest in appellate review is keen in this case and must override any perceived limits on standing

based on the Public Guardian's status or on Mr. Wellman's death. Absent review on the merits, the joint tenancies, which the appellate court found to have been created as a result of Attorney Young's undue influence over the elderly Mr. Wellman, remain viable. As a result of this Court's decision, Mr. Wellman's legitimate heirs will take nothing. The appearance of impropriety in an attorney's dealings with his elderly, confused client will persist. The attorney who has engaged in an unconscionable transaction with his client will walk away with almost a million dollars. This Court's decision leaves the most vulnerable elderly citizens – those who have no close family members to protect them – without the right of appellate review which is afforded them by the Illinois Constitution and which is provided to all other individuals. These unjust results cannot be permitted to stand.

In its decision, this Court stated that this matter could be referred to the Attorney Registration and Disciplinary Commission. Indeed, the matter has already been referred to the ARDC, No. 92-CI-124. However, the ARDC may not have the authority to order Sam Young to return the $900,000 in joint tenancy assets to Mr. Wellman's estate without making the repayment a condition of Young's retention of his law license or of reinstatement, if he is disbarred. Certainly, Mr. Young could defeat such an attempt at discipline by simply walking away from his license to practice law.

POINTS OVERLOOKED OR MISAPPREHENDED

This Court should grant rehearing because it may have overlooked or misapprehended the following

points, which are argued in detail in the numbered sections below: (1) the public interest implications of this case override traditional standing requirements; (2) even without the overriding public interest which demands review on the merits, the Public Guardian has standing to appeal as the attorney chosen by the trial court to exercise this constitutional right; (3) to deny an appeal by the former guardian on behalf of the estate of an alleged disabled individual, who has no relatives to pursue an appeal, is a violation of equal protection and due process in light of the fact that every other civil litigant, including a disabled individual who has relatives, may appeal adverse civil decisions in Illinois; (4) long-established authority, including that cited by this Court, supports the standing of the guardian to obtain appellate review in this case, even after the restoration of the ward; (5) John Wellman's death did not moot the issue of whether the trial court erred in refusing to sever the joint tenancies. If the trial court erred, as the appellate court found that it did, but its decision cannot be reviewed, an attorney will profit by his misbehavior, take the entire proceeds of the estate under the joint tenancy agreement, and Mr. Wellman's estate will never pass through probate to his heirs or to the State of Illinois. This is a result which this Court should not countenance, yet the ARDC is not equipped to prevent.

I. THE ISSUE OF WHETHER AN ATTORNEY TOOK ADVANTAGE OF HIS FIDUCIARY RELATIONSHIP WITH HIS ELDERLY, CONFUSED CLIENT TO ENRICH HIMSELF IS NOT MOOT AND SHOULD BE REVIEWABLE.

The public interest is the basis of a well-recognized and necessary exception to traditional principles of standing and mootness. The majority may have misapprehended or overlooked the significance of the public interest in this case.

The key issue raised by the Public Guardian on appeal and the major issue ruled upon by the Illinois Appellate Court was whether the trial court erred in refusing to sever the joint tenancies allegedly created through an attorney's undue influence over his elderly, confused client. (App. Ct. Order, March 15, 1995, at 26-30) This issue has serious public interest implications, which should not be considered moot due to Wellman's restoration or his death. Because overreaching by an attorney and the protection of the disabled are at issue here, the public interest demands that review of the lower court's decision be available in this case.

This Court never considered the substantive issue which the Illinois Appellate Court decided – that is, that Attorney Samuel Young illegally took almost $900,000 from his client, John Wellman. By its decision on standing, this Court in effect ruled that the issue is moot. If this Court's decision stands, then an attorney, Samuel Young, will stand to profit from what the Illinois Appellate Court

determined to be an unconscionable transaction. In addition, a contest is currently pending in Cook County Probate Court over a will which Mr. Wellman purportedly signed 10 days before his death, leaving his entire estate to Samuel Young. If this Court's decision stands, the probate contest will become moot because Young will take Mr. Wellman's entire estate pursuant to the joint tenancy agreement, and nothing will be left in the estate to pass through the will.

II. THE TRIAL COURT PROPERLY FULFILLED ITS DUTY TO PROTECT DISABLED INDIVIDUALS BY AUTHORIZING THE PUBLIC GUARDIAN TO EXERCISE THE CONSTITUTIONAL RIGHT TO SEEK APPELLATE REVIEW OF ITS DECISION WHEN NO ONE ELSE WAS AVAILABLE TO DO SO.

The right to appeal from a final judgment in a civil case is constitutional. Constitution of 1970, Art. 6, § 6. The Probate Act of 1975 provides that appeals may be taken as in other civil cases. 755 ILCS 5/26-1. Thus, the basis for an appeal in this case is constitutional, not statutory.

The Probate Act provides for the termination of an adjudication of disability upon the filing of a petition by or on behalf of the ward or on the court's own motion. 755 ILCS 5/11a-20(a). Notice of the hearing on the petition must be given to the guardian. 755 ILCS 5/11a-20(c). Some courts use an "interested party" analysis to determine standing. It is important to note that the Probate Act defines "interested person" to include the representative and "representative" to include the guardian. 755 ILCS 5/1-2.11, 2.15.

Supreme Court Rule 304(b) (1) provides for immediate appeals by parties from final judgments that do not dispose of an entire proceeding, and without a special finding, for "[a] judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Even without the trial court's order granting standing, the Public Guardian was a party below. Therefore, the rules of this Court grant the Public Guardian the right to appeal.

Irrespective of the constitutional, statutory and regulatory bases for the Public Guardian's right to appeal in this case, unless the issue is moot, an attorney chosen by the court in its capacity as *parens patriae* of an allegedly disabled person should have the right to appeal an adverse ruling under the circumstances of this case. Otherwise, the trial judge becomes "the absolute ruler over his own decision." *People ex rel. Dombroski v. O'Connell*, 378 Ill. 346, 349-350, 38 N.E.2d 40 (1941). Obviously, the trial judge in this case did not want or expect this unfettered power. That is why he granted the Public Guardian authority to pursue this appeal. Neither should this Court countenance an unreviewable decision by the trial court, especially in light of the appellate court's ruling that the trial court's decision was against the manifest weight of the evidence.

The Probate Act clearly authorizes the entry of the trial court's order authorizing the Public Guardian to seek appellate review. *See* 755 ILCS 5/11a-21. (West 1992). The Act gives the trial court various options regarding a motion for restoration, which this Court set out in its opinion. *See* slip op. at 8. Among these options are: "(5)

make any other order which the court deems appropriate and in the interests of the ward." 755 ILCS 5/11(a)-21(c) (West 1992). In addition, as the majority of this Court correctly explains in its decision, the "guardian only acts as the hand of the court and is at all times subject to the court's direction in the manner in which the guardian provides for the care and support of the disabled person." Slip op. at 9.

In recognition of traditional standing requirements, the Public Guardian asked the trial court to grant him standing to appeal what he perceived to be a ruling adverse to his former ward. If no one had been authorized to appeal, the trial court's ruling would have gone unchallenged. The trial court recognized that he, like any other judge, could make a mistake. He also recognized his obligation as *parens patriae* to protect the former ward and his estate, particularly in light of the serious allegations of undue influence by an attorney in this case. The trial court entered an order, supplementing its restoration order, which it believed to be appropriate and in the interests of the ward.

Specifically, the trial court granted the Public Guardian standing, as the guardian of Wellman, to pursue the appeal. Conceivably the court could have appointed anyone to pursue the appeal. However, the court granted the standing to the Public Guardian as the most appropriate person in light of the background and circumstances of the case.

Thus, the trial judge himself recognized the need to confer standing on someone to exercise the right of

review.[1] [sic] Consequently, he entered an order essentially permitting the Public Guardian to remain in the case solely for the purpose of pursuing this appeal.[2] [sic] This action by the trial court was not an abuse of discretion, when no one was available to exercise this constitutional right for Mr. Wellman. The Public Guardian was the logical choice to see that Wellman received the additional protection of appellate review because he was the plenary guardian and litigated the case below.

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[1] [sic] This ruling was prudent in light of the trial court's finding that "[i]t was not proven by even a preponderance of the evidence that John F. Wellman has the ability or capacity to perform the tasks necessary for the routine care and safety of his person or for the tasks incidental to the paying of bills, writing checks, making purchases and managing his estate at the level of performance." It was also reasonable in light of the observation of Dr. Stern, Sam Young's own son-in-law, that Mr. Wellman was "pathologically reluctant to spend money."

[2] [sic] In its decision, the majority stated that the trial court discharged the Public Guardian, perhaps in reliance upon the form order entered on July 8, 1991. In the Appendix to this petition, the Public Guardian has included the other order entered by the trial court on July 8, 1991. In paragraph two, Judge Ericsson ordered Sam Young to "report promptly to the Court, to Patrick T. Murphy, and to Robert J. Downing, the occurrence of any one or more of the following, in which he participates as agent: (a) if Wellman executes a will; (b) if Wellman revokes any joint tenancy; (c) if Wellman makes provision for a gift or gifts to others at his death; or (d) if Wellman should die; . . . " If the trial judge had actually intended to discharge the Public Guardian, which his deletion of the ultimate paragraph in Downing's draft order demonstrates that he did not, he would not have ordered Young to report to the Public Guardian pending resolution of this appeal.

The dispositive issue before this Court should not be standing. This Court, like the trial court, can simply remove the Public Guardian and appoint another lawyer to pursue the appeal. To deny the right to appeal is to render the matter moot and hence non-reviewable. This Court erred when it reversed the trial court's decision to confer standing on the Public Guardian, and failed to confer standing on anyone else to protect Mr. Wellman's interest. This Court's decision to moot this appeal in this manner has serious constitutional implications which must be considered. *See* section III *infra.*

In *People ex rel. Dombroski v. O'Connell,* 378 Ill. 346, 38 N.E.2d 40 (1941), this Court faced an issue similar to the issue here. Several children sought the appointment of a conservator for their 81-year-old father. The father and two other siblings were made defendants. The probate court denied the petition. The children seeking the conservator sought an appeal to the circuit court, which was refused. These children then filed a writ of mandamus in this Court.

Those who opposed the conservatorship moved to strike the mandamus petition, arguing that the children who sought conservatorship lacked standing because they "had no appealable interest and were not persons aggrieved by the order denying appointment of a conservator. . . . " 378 Ill. at 347-348. This Court held that the filing of the conservator petition made the children petitioners and therefore parties. This Court also pointed out that as next of kin, the children of the alleged incompetent had a right to file the petition and since they had the right to file a petition, they had a right to appeal. This Court stated:

> If they have no right to appeal as a party aggrieved from a final order against them as petitioners, the question arises: who may exercise the right of appeal given by [the Probate Act]? It is conceded that had the court decided the issues against the defendants, they or any of them could appeal from such decision. If petitioners may not appeal, and the defendants may, then the statutory provision giving the right to appeal to one feeling himself aggrieved fails to provide due process of law, and the judge who enters the order is in a position of *being the absolute ruler over his own decision. Such a situation is abhorrent to the letter and spirit of the law.*

378 Ill. 349-350 (emphasis added).

The trial court here recognized that its decision to restore John Wellman to competency did not moot either that issue (which may have become moot when John Wellman died) or the issue of whether Sam Young illegally entered into the joint tenancies with his client, John Wellman. These were issues for review. The only question that remained was who had standing to pursue these issues. The trial court correctly gave that task to the Public Guardian, who had litigated the case. Here, this Court should accept the trial court's decision to confer standing, or should appoint another attorney, such as the State's Attorney of Cook County, who is contesting the will, to pursue the appeal.

III. TO DENY AN APPEAL BY THE FORMER GUARDIAN ON BEHALF OF THE ESTATE OF AN ALLEGED DISABLED INDIVIDUAL, WHO HAS NO RELATIVES TO PURSUE AN APPEAL, IS A VIOLATION OF EQUAL PROTECTION AND DUE PROCESS OF LAW.

The United States Supreme Court has repeatedly held that where a state "has accorded bedrock procedural rights to some, but not to all similarly situated. . . . " it will find a denial of the equal protection of laws. *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S. Ct. 1208, 1216, n.10 (1972). In addition, due process is violated where a litigant is effectively deprived of his constitutional right of an appeal. Finally, where appeal rights are granted unequally, *i.e.*, where an appeal is afforded to one litigant but not to his opponent in a civil case, both due process and equal protection are violated.

In Illinois, parties to civil proceedings, including proceedings in probate have the right to appeal adverse decisions. In addition, Illinois law recognizes the standing of a party, who sought unsuccessfully to become the guardian of an allegedly disabled individual, to exercise the right to appeal the decision if the party is a relative. *See People ex rel. Dombroski v. O'Connell, supra.* However, if this Court's decision finding that the Public Guardian has no standing becomes law, a small class of individuals who are parties in the trial court will be denied the right to appeal an adverse decision in civil proceedings in general and probate proceedings in particular – guardians of the estate or person of a ward who has been

restored.[3] To deny the right to appeal from an order of the probate court to one party but not to others is unconstitutional.

The Public Guardian did not become the guardian of the estate and person of John Wellman simply because he is the Public Guardian of Cook County. Rather, the court appointed the Public Guardian because it determined that Mr. Wellman was disabled and required a guardian. Later, the same court decided that Mr. Wellman was not disabled and did not need a guardian. The court then quite properly determined that the Public Guardian, as the guardian of Mr. Wellman's estate, should have standing and the right to seek review of the ruling on guardianship (an issue which may have become moot when Mr. Wellman died), and more importantly, its ruling on whether Mr. Young's "agreement" with Mr. Wellman, by which Mr. Young enriched himself, was valid.

For purposes of the appeal, the Public Guardian thus stands in the shoes of John Wellman, the disabled – or potentially disabled individual – who entered into a prima facie unconscionable contract with his agent and attorney, Samuel Young. It makes no sense to give every other civil litigant the right to appeal but to deny the right of appeal to a guardian – or former guardian whom the trial court nominated to exercise the right to appeal – and to whom this Court's own rules appear to grant party status for purposes of appeal. As the trial court itself recognized, the result of denying any review could be

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[3] This right might also be denied to any non-relative who unsuccessfully seeks to become guardian of the estate and/or person of an individual.

disastrous. Likewise, there is no rational basis for finding no standing, and thereby denying appellate review to a party whom the trial court nominated to exercise the right to appeal, particularly under the circumstances of this case.

The issue of the validity of the joint tenancies is not moot. Therefore, the sole question which remains is who has standing to appeal the decision that the joint tenancies need not be severed. By its ruling, this Court has held that no one has such standing. As a result, in a situation like that presented here, a decision by the trial court, which the appellate court found to be against the manifest weight of the evidence, would never be reviewed. The denial of standing makes the case effectively unreviewable and discriminates against a small class of litigants without any rational basis.

IV. LONG-ESTABLISHED AUTHORITY, INCLUDING THAT CITED BY THIS COURT, SUPPORTS THE STANDING OF THE GUARDIAN TO OBTAIN APPELLATE REVIEW, EVEN AFTER THE RESTORATION OF THE WARD.

Although the weight of authority leans toward approving the guardian's right to appeal an order terminating his ward's incompetency (*see Tingle v. Harvill*, 125 Ga. App. 312, 320-21, 187 S.E.2d 536 (1972), citing 44 C.J.S. 152, 41 Am.Jur.2d 568, and 122 ALR 541), this Court relied on two cases to the contrary. However, both the 1969 Ohio case, *In re Guardianship of Love*, 19 Oh.St.2d 111; 249 N.E.2d 794 (1969), and the 1916 Massachusetts case,

Ensign v. Faxon, 224 Mass. 145, 112 N.E. 948 (1916), quoted in *Love*, are readily distinguishable.

In its opinion in *Love*, the Ohio Supreme Court framed the issue as whether a guardian has the right to appeal where the Probate Court determines that the ward has regained his mental competency and terminates guardianship "in a situation where no interest adverse to the ward is involved in such order of termination." The *Ensign* court also referred to the absence of an adverse interest and reasoned that no harm could come from the refusal to recognize the standing of the guardian.

By contrast, this case involves an interest potentially adverse to the ward – the joint tenancy agreement drawn up by Sam Young, which he used undue influence to persuade John Wellman to sign. This case also involves serious harm if no one has the right to appeal. *See* Sections I and II *supra*. Another distinguishing factor, obviously, is the fact that the trial court in this case, unlike the trial courts in Ohio and Massachusetts, recognized the need to confer standing for purposes of appeal and gave the former guardian permission to appeal its ruling.

Because this Court may have overlooked the fact that the weight of authority favors the former guardian's right to appeal a restoration of his ward, this Court should grant rehearing.

V. JOHN WELLMAN'S DEATH DID NOT MOOT THE ISSUE OF THE PROPRIETY OF THE JOINT TENANCIES. IF THE TRIAL COURT ERRED IN REFUSING TO SEVER THE JOINT TENANCIES, AS THE APPELLATE COURT FOUND THAT IT DID, BUT ITS DECISION CANNOT BE REVIEWED, AN ATTORNEY WILL GAIN ALMOST A MILLION DOLLARS AS A RESULT OF HIS UNETHICAL UNDUE INFLUENCE. THIS IS AN INJUSTICE WHICH THIS COURT SHOULD NOT COUNTENANCE, ESPECIALLY BECAUSE THE ARDC MAY NOT HAVE THE AUTHORITY TO PREVENT IT.

In the majority opinion, this Court stated that irrespective of issues of the Public Guardian's standing, Mr. Wellman's death mooted the appeal. Mr. Wellman's death may have mooted the issues of his adjudication of disability and subsequent restoration. However, the issue of whether Young used undue influence in persuading Mr. Wellman to enter into the joint tenancy agreement remains. If this Court refuses to address this issue, Young stands to gain almost a million dollars by actions which the Illinois Appellate Court found to be unconscionable.

Under normal circumstances, such as in *Estate of Burgeson*, 163 Ill. App. 3d 233, 516 N.E.2d 590 (1st Dist. 1987), *aff'd* 125 Ill. 2d 477, 532 N.E.2d 825 (1988), when the alleged disabled person dies, the question of testamentary capacity arises. In this case, Mr. Wellman's heirs could argue that he was disabled and under the undue influence of Young when he signed a will, ten days before his death. If this Court refuses to reach the issue of the joint tenancies, however, Wellman's testamentary capacity will be irrelevant. Mr. Wellman's entire estate will

pass to Young, as joint tenant, and nothing will be left to pass through the will. If this Court does not reconsider its decision, when the mandate issues almost one million dollars will pass automatically to Sam Young, as surviving joint tenant.

The facts which demonstrate Mr. Wellman's disability and his inability to effectively enter into the joint tenancy with his attorney without independent advice are more than adequately documented in the Illinois Appellate Court decision. To summarize, within two weeks after John Wellman was admitted into Evanston Hospital suffering from what Young's own son-in-law termed to be "age related debility, senile dysfunction and an underlying personality disorder" with episodes of confusion and agitation, Young prepared a letter which Wellman signed, making Young a joint tenant of his entire estate with right of survivorship. (*See* App. Ct. Order, March 15, 1995 at 19-20, 11-12).

Once before, in May, 1989, when Wellman made noises about leaving $35,000 to Young in a will, Young sent an independent lawyer, Robert Brody, to see Wellman. "When Wellman met Brody, Wellman was not very cooperative and not very interested. Brody left his business card but Wellman never contacted Brody." (App. Ct. Order, March 15, 1995 at 10-11). However, in November, 1989, when Young prepared the documents making Young a joint tenant on accounts valued at more than $800,000, Young never referred Mr. Wellman to an independent attorney for advice.

The Illinois Appellate Court quite charitably points out that although it refused to reach the issue of whether

Wellman was mentally disabled when he entered into the joint tenancy arrangements, "[t]here is sufficient evidence that Wellman at least at times may not have understood his affairs, had memory lapses, and was confused. It cannot be concluded that the transactions were made with Wellman's complete understanding of the consequences and without undue influence of his attorney." (App. Ct. Order, March 15, 1995 at 29). The Appellate Court reasoned that a fiduciary relationship exists between an attorney and client as a matter of law in Illinois. Where the attorney enters into the transaction with the other party to the fiduciary relationship by which the attorney benefits, the court must determine whether the transaction was fair. One of the facts to be considered is whether the consideration was adequate and the principal had independent advice before completing the transaction.

The important substantive issue of whether Attorney Young unduly influenced his elderly, confused client was never considered or ruled upon by this Court. As pointed out above, these issues are not moot. The issue should not be whether the Public Guardian, as the former guardian of Mr. Wellman, had standing, but whether the issue of the propriety of the joint tenancy agreement is still ripe for a decision. If so, someone should have standing both pursuant to the restoration provision of the Probate Act and pursuant to the court's ancient authority as *parens patriae* to protect the interests of any alleged disabled person. This is especially true in this case, where not a single expert testified that Mr. Wellman was capable of handling his affairs.

This Court has an obligation to carefully scrutinize transactions between lawyers and clients, particularly transactions by which an attorney stands to profit to the tune of almost one million dollars in exchange for minimal legal work. This Court should not stand idly by when an 89-year-old bachelor with no living family members, who suffers from senile dysfunction, enters into a contract which benefits the attorney who prepared the contract, and about which the elderly person had no independent legal advice. Mr. Wellman's rambling and tragic testimony was properly considered by the Appellate Court and should not have been disregarded by this Court in reaching a decision concerning his "agreement" with Sam Young.

As the Illinois Appellate Court emphasized, when Mr. Wellman was asked whether he recalled "putting his treasury bills, bank accounts, and stock in joint ownership with Young with right of survivorship. . . . " Wellman responded:

> No. I might have done it, though. I can't be positive on all these things here.
>
> But the role conjunctured to be of good avail, and good feelings for everybody concerned, whether you're on the south side at 22nd Street or north of 22nd Street.
>
> I draw no line as to how I want to flex this thing. That's a big job for a guy that's 90 years old, but that's the best I done.

This Court has overlooked the devastating impact its decision will have on the integrity of the legal profession. At a time when the public's respect for lawyers is at an all time low, can this Court afford to ignore the plight of the

elderly citizens in Illinois, or the disrepute in which many citizens hold lawyers? This Court should not countenance undue influence by a member of the Bar over an elderly, confused man who has no family members to protect him. This Court should not let an attorney walk away with almost a million dollars which he gained through his unethical and unconscionable actions.

The need to address the important issues in this case should not be defeated by declaring that no one has standing to seek justice through a review of the facts and law by a higher court. Where legal issues exist, courts must resolve them. Otherwise we all suffer.

CONCLUSION

For the reasons stated herein, the Public Guardian respectfully requests that this Court grant rehearing in this case and affirm the decision of the appellate court severing the joint tenancies. In the alternative the Public Guardian asks that this Court grant rehearing, order additional briefing on the standing issue and set the case for additional oral argument on the issue.

Respectfully submitted,

/s/ Patrick T. Murphy
Patrick T. Murphy
Public Guardian of
Cook County

PATRICK T. MURPHY
PUBLIC GUARDIAN OF COOK COUNTY
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CHICAGO, ILLINOIS 60612
312-433-4300

APPENDIX

In re Estate of Wellman, Circuit Court of Cook County, Probate Division No. 90 P 3251, July 8, 1991 order.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

ESTATE OF	)	Case No. 90 P 03251
JOHN F. WELLMAN	)	Docket 228
	)	Page 008

ORDER

(Filed July 3, 1991)

THIS CAUSE coming on for hearing upon the motion of Patrick T. Murphy, Public Guardian of Cook County, for a stay of enforcement of this Court's Final Judgment Order entered on June 3, 1991; the Court on June 12, 1991 having heard and considered the arguments of counsel supporting and opposing said motion, and having read and considered the motions, briefs, memoranda and other materials filed with the Court, and, being fully advised in the premises, having at the close of argument rendered its ruling orally from the bench, a true and correct transcript of which is attached to this draft Order as Exhibit "A" and made a part hereof; and the Court now desiring to memorialize its said ruling in the instant draft Order, *nunc pro tunc* to June 12, 1991,

IT IS ORDERED:

1. That the motion of Murphy for a stay of enforcement of this Court's Final Judgment Order entered on June 3, 1991 is denied; and

2. That pending the disposition of the appeal by Murphy from the Final Judgment Order of June 3, 1991, Samuel H. Young, as agent of Wellman, shall report promptly to the Court, to Patrick T. Murphy, and to Robert J. Downing, the occurrence of any one or more of

the following in which he participates as agent: (a) if Wellman executes a will; (b) if Wellman revokes any joint tenancy; (c) if Wellman makes provision for a gift or gifts to others at his death; or (d) if Wellman should die; and

3. That the Order entered herein on March 27, 1991, setting the petition of Robert J. Downing and Miller, Forest and Downing, Ltd. for attorneys' fees for hearing on July 10 and 11, 1991, is vacated, said petition having been rendered moot by the Court's Final Judgment Order of June 3, 1991; and

~~4. That Patrick T. Murphy, Public Guardian of Cook County, is discharged as plenary Guardian of the Estate of John F. Wellman~~. RDE

DATE: _____, 1991.
ENTER:

/s/ Robert D. Ericsson
Judge Judge's No.

Robert J. Downing
MILLER, FOREST AND DOWNING, LTD.
Attorney No. 24104
Attorneys for John F. Wellman
800 Waukegan Road
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APPENDIX D

SUPREME COURT OF ILLINOIS
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Mr. Patrick T. Murphy
Public Guardian of Cook County
28 North Clark Street, S#450
Chicago, IL 60602

No. 80182 - 80184 80246 Cons.

In re: Estate of John Wellman (John Wellman, et., al., etc., appellees, v. Samuel Young, etc., et al., appellants). Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petitions for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 12, 1996.

Bilandic, C.J., took no part.

Supreme Court, U.S.
FILED
MAR 25 1997
OFFICE OF THE CLERK

(2)

No. 96-1384

In The

Supreme Court of the United States

October Term, 1996

PATRICK T. MURPHY,
Cook County Public Guardian, as Discharged Guardian
of the
Estate and Person of John F. Wellman,
a Disabled Person, Deceased,

Petitioner,

v.

SAMUEL H. YOUNG, An Interested Person and
SAMUEL H. YOUNG, Executor of the Estate
of John F. Wellman, Deceased,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF RESPONDENT SAMUEL H. YOUNG, AN INTERESTED PERSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner's "Question Presented for Review" is faulty, fails to mention that Murphy was discharged as guardian of Wellman on July 3, 1991, that at all relevant times, Wellman had no living relatives, and that Wellman died on August 17, 1991.

RESPONDENTS BRIEF IN OPPOSITION

Respondent, Samuel H. Young, an Interested Person, requests this Court to deny the Petition for Writ of Certiorari to review the Opinion of the Supreme Court of Illinois, entered October 18, 1996 (Petition, Appendix A). Such Opinion held that the Petitioner, Patrick T. Murphy, Public Guardian of Cook County ("Murphy") had no "legal standing" to appeal the Final Judgment Order entered by the Probate Court June 3, 1991 ("FJO"), restoring John F. Wellman ("Wellman"), since Murphy had been discharged as plenary guardian of Wellman on July 3, 1991, and Wellman subsequently died on August 17, 1991.

OPINIONS BELOW

Petitioner's recitation of "Opinions Below" omits the FJO entered June 3, 1991 restoring Wellman to legal capacity and denying Murphy's petition to revoke the broad durable power of attorney Wellman had executed in December, 1988, designating Samuel H. Young ("Young") as his agent. (*Illinois Power of Attorney Act*, Ill.Rev.Stat. 1987, Chp. 110½, § 802-1, et seq.) The Findings of Fact and Conclusions of Law of the FJO are contained in Respondent's Appendix A.

PETITIONER'S STATEMENT OF THE CASE IS FAULTY

Petitioner's Statement of the Case fails to describe Murphy as a discharged guardian attempting to appeal the restoration of a deceased former ward (Wellman), who had no living relatives and had executed a valid, general durable power of attorney designating Young as

his agent with full authority to act for Wellman, whether capable or incapable.

PETITIONER'S STATEMENT OF FACTS IS FAULTY

Petitioner's Statement of Facts set forth statements in the section entitled, "Preface" that are not factual and are false. There are no record citations in support.

At an *ex parte* hearing on May 8, 1990, the probate court adjudicated Wellman a disabled person and appointed Murphy as plenary guardian. Wellman was not present and no excuse for his absence was given as required by the *Illinois Guardians For Disabled Adults Act* (GDA), § 11a-11(a) (Ill.Rev.Stat. 1991, Chp. 110½, Article XI A, § 11a-11(a)). Nor was notice given to Young, as Wellman's attorney and agent under a durable power of attorney, or to Maryhaven, Inc., the facility where Wellman was residing, as required by the GDA, § 11a-10(b). Similarly, there was no disclosure of Wellman's durable power of attorney and attorney-client relationship with Young (Vol. 9, page 2, Record on Appeal, Report of Proceedings). Finally, the adjudication was not based on a "clear and convincing" evidence standard, but was based on a mere preponderance of the evidence standard as permitted by the GDA, in violation of the due process requirements of the U.S. Constitution. *Addington v. Texas,* 441 U.S. 418 (1979).

During the trial, Murphy testified he did not sign the Petition to adjudicate Wellman disabled, filed on March 30, 1990, which purported to be a verified signature of Murphy, with a notarization indicating Murphy executed same (Supp. Record on Appeal, Vol. 4, 2125 and 2126).

The FJO of June 3, 1991 held that Young disclosed all pertinent facts concerning the joint tenancy arrangements with Wellman; that Wellman had sufficient experience and advice from others concerning the joint tenancy arrangements before entering into such transactions; that Wellman understood the nature and consequences of placing his property in joint tenancy with Young; that Wellman had the requisite mental capacity to enter into the transactions; that Wellman acted freely and voluntarily in establishing the joint tenancy; that Young had not withdrawn, received, nor been paid any money from the joint tenancy accounts; that it was Wellman's intent and desire to continue Young as his agent under a durable power of attorney; that his joint tenancy arrangements with Young remain undisturbed; and that Young had proved by clear and convincing evidence such facts rebutting any presumption of fraud and undue influence. *See*, Appendix A, Final Judgment Order of June 3, 1991, Findings of Fact and Conclusions of Law, ¶¶ 22-32.

The FJO, Findings of Fact and Conclusions of Law, Appendix A, ¶ 14, held that during the period from November, 1989 through May 8, 1991 (the last day of trial), Wellman was fully competent and not disabled. The probate court thus held that Wellman was never incompetent nor disabled during the period of the guardianship from May 8, 1990 through June 3, 1991. The GDA, § 11a-20(a) (Ill.Rev.Stat. 1991, Chp. 110½) required proof by "clear and convincing evidence" that Wellman was entitled to termination of the guardianship. Wellman met this standard.

Petitioner's statement that "Robert Downing ("Downing"), an attorney acting in concert with

Young, . . . " is false, without support in the record, and contrary to fact. Downing is a former judge of the Circuit Court of Cook County, Illinois, and a retired justice of the Appellate Court of Illinois, who was employed by Wellman and appointed by the Court. Both Downing and Young had professional obligations to represent the wishes and desires of Wellman.

THE PETITION IS WITHOUT MERIT AND SHOULD BE DENIED

Petitioner Murphy erroneously seeks to equate his status in the Wellman proceedings and litigation with the status of children of the alleged incompetent *Dombrowski. People ex rel. Dombrowski v. O'Connell,* 378 Ill. 346, 38 N.E. 2d 40 (1941). The children appealed the Probate Court's denial of their petition for appointment of a guardian to the Supreme Court of Illinois which held that, as next of kin, the children would be liable for the support of Dombrowski if his estate was wasted, and that they had legal standing to appeal the denial of the petition for the appointment of a conservator.

Unlike Dombrowski's next of kin, Murphy, a discharged guardian of Wellman, had no interest as next of kin of Wellman, had no interest as a creditor of Wellman, and had no potential liability to support Wellman, if Wellman wasted his estate. Murphy had no legally recognizable interest in the restoration of Wellman and with respect to the estate of Wellman, deceased. Murphy's position was adverse to Wellman. Wellman had a United States Constitutional right, as a restored free citizen, to make his own decisions as to his person and property.

Murphy, petitioner, had no right to make decisions for Wellman. *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Petitioner erroneously argues the holding of this Court in *Lindsey v. Normet*, 405 U.S. 56 (1972), that an Oregon statute requiring an appealing tenant to file a bond, double the amount of an appealing landlord, somehow supports the right of a discharged former guardian of a deceased former ward to appeal the restoration of the ward. No issue of standing was involved in *Lindsey*.

CONCLUSION

There is no important question presented by the October 18, 1996 Opinion of the Supreme Court of Illinois. The judgment of the Supreme Court of Illinois rests on adequate, non-federal grounds. *U.S. ex rel. Pascal v. Burke*, D.C. Pa. 1950, 90 F.Supp. 1968.

The Petition of Murphy misstates the facts, misstates the law, is without merit, and ought to be denied.

Respectfully submitted,

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An interested Person

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APPENDIX A – FINDINGS OF FACT AND CONCLUSIONS OF LAW IN FINAL JUDGMENT ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS PROBATE DIVISION ESTATE OF JOHN F. WELLMAN CASE NO. 90P03251 ENTERED JUNE 3, 1991

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That John F. Wellman (principal), a disabled person, executed an agency agreement on December 27, 1988 giving Samuel H. Young (agent), a durable power of attorney. Samuel H. Young owes a fiduciary duty to John F. Wellman.

2. That the petition to revoke the aforementioned agency is brought pursuant to Ill. Rev. Stat. Ch. 110-1/2, §802-9 and §802-10, and known as the "Illinois Power of Attorney Act".

3. That Petitioner, Patrick T. Murphy, Plenary Guardian of John F. Wellman, is an "interested person" with legal standing to petition for revocation of the durable power of attorney executed by John F. Wellman.

4. That Petitioner, Patrick T. Murphy, Plenary Guardian of John F. Wellman, has the burden to show by competent evidence that Samuel H. Young's agency should be revoked pursuant to Ill. Rev. Stat. Ch. 110-1/2, §802-9 and §802-10.

5. That Samuel H. Young and John F. Wellman entered into an agreement dated December 1, 1989, as evidenced by two letters of the same date, the terms of which were that in consideration of Samuel H. Young's assisting John F. Wellman in caring for his person and managing his property, John F. Wellman would place his

property in joint tenancy with Samuel H. Young with a right of survivorship. However, John F. Wellman restricted the use of his assets and income to his own use and benefit during his lifetime.

6. That Samuel H. Young also agreed as part of the December 1, 1989, agreement, that John F. Wellman could make a will and revoke the joint tenancies at any time. Also, that John F. Wellman could provide for gifts to others at his death and that the gifts would be paid by Samuel H. Young from the assets held in joint tenancy.

7. That the terms of the agreement were definite and certain and a contract clearly was established.

8. That at the time of the aforementioned agreement, a fiduciary relationship existed between Samuel H. Young and John F. Wellman based upon the parties attorney-client relationship and principal-agent relationship.

9. That the agreement to establish the joint tenancies is presumptively valid, and the party seeking to sever such joint tenancy agreements and accounts has the burden of establishing by clear and convincing evidence, that no gift was intended. See, *Murgic v. Granite City Trust & Savings Bank,* 31 Ill. 2d 587, 202 N.E. 2d 470 (1964).

10. That the mere fact that a donee of a joint tenancy is in a fiduciary capacity with the donor, it alone does not serve to rebut the presumption of donative intent. Instead, when a donee is in a fiduciary relationship with the donor, the transaction may be severed or revoked only upon proof of facts from which the court may infer that the donee abused or betrayed his position of confidence with the donor. *In re Estate of Wilkenning,* 109 Ill.

App. 3d 934, 441 N.E. 2d 1 (3rd Dist. 1971), *In re Estate of Foster*, 104 Ill. App. 2d 447, 44 N.E. 2d 620 (5th Dist. 1969).

11. That notwithstanding the aforementioned conclusion of law, a presumption of fraud and undue influence has been raised due to the fiduciary relationship between Samuel H. Young and John F. Wellman that existed at the time of the transaction. The burden is on the respondent, Samuel H. Young to present clear and convincing evidence to rebut the presumption of fraud and undue influence. *Estate of Wessels v. Burros*, 203 Ill. App. 3d 1080, 561 N.E. 2d 1212 (1990).

12. That Dr. Mark Amdur's diagnosis of manic psychosis, grandiosity and organic mood syndrome was refuted by the evidence, but not his diagnosis of mild dementia.

13. That the evidence proved that in Evanston Hospital in November, 1989, John F. Wellman suffered from mild dementia; paranoia as to his fear that people were trying to steal his money and as to his health; periodic episodes of confusion and anxiety; and, severe anemia that necessitated periodic blood transfusions; and, that he continued in this condition through May 8, 1990 and May 8, 1991, the date of the hearing on his petition to be restored.

14. That from November, 1989 through May 8, 1991, the evidence proved that John F. Wellman who was ninety years of age was substantially oriented to time, place and person; that he was aware of the persons present and the circumstances of their being with him; that he was sociable and wanted to converse though he considered himself a loner; that he could read and knew

what he read; that he has a severe hearing problem; that he understands questions when he can hear them; that he answers questions both orally and in writing and that his responses are appropriate to the questions asked; that he is aware of the amount of his assets and of the nature of his investments; and that he knows what he is about in controlling his investments and in the location of his assets.

That due to his aforesaid conditions John F. Wellman, becomes tired, exhausted and lapses into confusion or dementia and his communication begins to ramble and become meaningless. That haldol therapy has helped. That the extent of his dementia varies due to his anemia and blood transfusions.

15. That John F. Wellman is aware and knows that he has no heirs and no will or trust, and, that without acting to direct the disposition of his estate, the State of Illinois would receive his assets.

16. That John F. Wellman has the mental capacity and ability to communicate with his doctor, to understand his mental and physical conditions, and make responsible and appropriate decisions concerning his health care.

17. That John F. Wellman has the mental capacity and ability to make and communicate responsible decisions concerning the control, investment and management of his financial affairs and the disposition of his estate.

18. That it was not proved by even a preponderance of the evidence that John F. Wellman has the ability or

capacity to perform the tasks necessary for the routine care and safety of his person or for the tasks incidental to the paying of bills, writing checks, making purchases and managing his estate at that level of performance.

19. That the evidence proved that John F. Wellman a partially disabled person who lacks some but not all of the capacity as specified in Ill. Rev. Stat. Ch. 110-1/2, §11a-3 and, therefore, is entitled to the appointment of a limited guardian of the person and estate. Ill. Rev. Stat. Ch. 110-1/2, §11a-12(c).

20. That the purpose of the Durable Power of Attorney Act is that "each individual has the right to appoint an agent to deal with property or make personal and health care decisions . . . throughout the principal's lifetime, including periods of disabilities . . . " Ill. Rev. Stat. Ch. 110-1/2, §802-1.

21. That an attorney is not prohibited from dealing with his client, and transactions, if open, fair and honest when deliberately made, are valid. Factors used in determining whether a transaction is fair include a showing by the fiduciary (1) that he made a full and frank disclosure of all the relevant information he had; (2) that the consideration was adequate; and (3) that the principal had independent advice before completing the transaction. *McFail v. Braden,* 19 Ill. 2d 108, 166 N.E. 2d 46 (1960); See also *In re Barrick,* 87 Ill. 2d 233, 429 N.E. 2d 842 (1981); *Franciscan Sisters Health Care v. Dean,* 95 Ill. 2d 452, 448 N.E. 2d 872 (1983).

22. That Samuel H. Young disclosed all pertinent facts concerning the joint tenancy arrangements with John F. Wellman. See, *McFail,* Supra.

23. That John F. Wellman had sufficient experience as an accountant and non-legal independent advice given to him by bank employees Paul Larson and Andy Vlahos, and, Wallace Johnson, a stock broker and financial consultant, concerning the joint tenancy arrangements before entering into the transactions. See, *Barrick,* Supra; *Franciscan Sister,* Supra.

24. That John F. Wellman understood the nature and consequences of placing his property in joint tenancy with Samuel H. Young with right of survivorship. That John F. Wellman had the requisite mental capacity to enter into the transactions. See, *Estate of Galvin,* 112 Ill. App. 3d 677, 445 N.E. 2d 1223 (1983).

25. That John F. Wellman acted freely and voluntarily in establishing said joint tenancies.

26. That the consideration for said agreement was adequate and valuable, and therefore sufficient consideration to establish a contract between the parties. See, *McFail,* Supra.

27. That Samuel H. Young has not withdrawn, received and has not been paid any monies from the said joint tenancies. That Samuel H. Young has provided the services for John F. Wellman as set forth in their December 1, 1989 agreement.

28. That it is John F. Wellman's intent and desire that Samuel H. Young continue as his agent under a Durable Power of Attorney and that his joint tenancy arrangements with Samuel H. Young remain undisturbed.

29. That accordingly, Samuel H. Young has sustained his burden of presenting clear and convincing

evidence to rebut the presumption of fraud and undue influence. Consequently, the presumption no longer exists.

30. That petitioner now has the burden to prove by a preponderance of the evidence that Samuel H. Young committed acts of undue influence and fraud and that the joint tenancy agreements and accounts were procured as a result of said acts. *Franciscan Sisters,* Supra.

31. That petitioner has not sustained his aforementioned burden of proof.

32. That this court finds that Samuel H. Young has not breached his fiduciary duty to John F. Wellman by entering into an agreement with him on December 1, 1989 to place John F. Wellman's property in joint tenancy with a right of survivorship.

33. That Petitioner has failed to prove by a preponderance of the evidence that John F. Wellman lacks the capacity to control or revoke Samuel H. Young's agency. This court finds that John F. Wellman is indeed capable of controlling or revoking the agency.

34. That the petitioner has not proven by a preponderance of the evidence that Samuel H. Young has not acted for the benefit of John F. Wellman in accordance with the terms of the durable power of attorney.

35. That the petitioner has not proven by a preponderance of the evidence that Samuel H. Young's action or inaction has caused or threatens substantial harm to John F. Wellman's person or property.

36. That for the aforementioned reasons, petitioner has failed to sustain his burden of proof that Samuel H.

Young's agency should be revoked pursuant to Ill. Rev. Stat. Ch. 110-1/2, §802-9 and §802-10.

FINAL JUDGMENT ORDER

IT IS HEREBY ORDERED that the Petition to Revoke the Agency of Samuel H. Young under a Durable Power of Attorney executed by John F. Wellman on December 27, 1988, and, to declare null and void an agreement executed on December 1, 1989 by John F. Wellman with Samuel H. Young filed on July 24, 1990 be and is hereby dismissed.

IT IS FURTHER ORDERED that the Petition of John F. Wellman to be Restored, or to Vacate, Modify or Terminate the order of Adjudication entered on May 8, 1990, is hereby granted in favor of John F. Wellman and the Order of Adjudication of May 8, 1990 be and is hereby terminated.

IT IS FURTHER ORDERED that the order freezing the joint tenancy assets entered on May 24, 1990 be and is hereby vacated.

There is no just reason to cause the delay or immediate enforcement of this Final Judgment Order.

ENTER:

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ROBERT D. ERICSSON
JUDGE JUDGE'S NO.

DATED: _____

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